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REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION,  
SEPTEMBER TERM, 1888;

FOR THE

MIDDLE DIVISION,  
DECEMBER TERM, 1888;

AND FOR THE

WESTERN DIVISION,  
APRIL TERM, 1889.

GEORGE W. PICKLE,  
ATTORNEY-GENERAL AND REPORTER.

VOLUME III.

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1889.

*Rec. Aug. 9, 1889*

# JUDGES OF THE SUPREME COURT OF TENNESSEE.

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STATE AT LARGE.

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EASTERN DIVISION.

DAVID L. SNODGRASS.

MIDDLE DIVISION.

HORACE H. LURTON.

WESTERN DIVISION.

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GEORGE W. PICKLE,  
*Dandridge, Tenn.*

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\*Appointed by the Governor, and subsequently elected by the people, to fill the vacancy caused by the death of Chancellor John Somers.

†Appointed by the Governor, and subsequently elected by the people, to fill the vacancy caused by the death of Chancellor Henry T. Ellett.

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\* Holds Circuit Court of Knox County also.

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T. A. R. NELSON,	Criminal Court.....	Knoxville.

\* Appointed to serve unexpired term of M. R. Elliott.

† Elected August, 1888, to serve out the unexpired term of J. M. Porterfield.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION.

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KNOXVILLE, SEPTEMBER TERM, 1888.

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ANDREWS *v.* WARNER.

(*Knoxville.* September 12, 1888.)

I. APPEAL. *Discretionary. Not premature, when.*

An appeal is not prematurely granted—when allowed by the Chancellor, in the exercise of his discretion under § 3874 (M. & V.) Code, *before report by the Master*—from a decree, upon a bill to enforce a mechanic's lien, adjudging that complainant is entitled to recover the contract price for erecting a building “less the value of work necessary to its completion,” and ordering an account “to ascertain the exact amount due complainant on this basis.”

Code construed: § 3874 (M. & V.); § 3157 (T. & S.).

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Andrews v. Warner.

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2. SAME. *Same. Exercise of discretion presumed.*

Where an appeal lies in the Chancellor's discretion, the mere grant of the appeal, without more, is a sufficient exercise of his discretion.

(See 1 Heis., 752.)

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FROM HAMILTON.

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Appeal from Chancery Court of Hamilton County.  
D. C. TREWHITT, J., sitting by interchange.

N. H. BURT for Complainants.

W. L. EAKIN for Respondents.

CALDWELL, J. This bill was filed for the enforcement of a mechanic's lien.

The Chancellor heard the cause upon the pleadings and proof, and thereupon adjudged the complainants entitled to recover the amount for which they had agreed to erect the building, less the value of work necessary to its completion. To ascertain the exact amount due complainants upon this basis the cause was, in the same decree, referred to the Master for an account and report.

At the same term, and before the coming in of the Master's report, the complainants appealed from the decree mentioned.

The defendants now insist that the appeal is premature, because taken before report by the Master and action thereon by the Chancellor, and upon

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this ground they move this Court to dismiss the appeal.

The motion is not well made.

The appeal is authorized by section 3874 of the Code (M. & V.), which is in the following language:

"The Chancellor or Circuit Judge may, in his discretion, allow an appeal from his decree in equity causes, determining the principles involved, and ordering an account, or a sale, or partition, *before the account is taken, or the sale or partition is made,*" etc.

Manifestly the decree here appealed from determines the "principles involved" in the litigation, and *the granting* of the appeal by the Chancellor was an exercise of "his discretion" to allow it.

The motion is overruled.

## BRADFORD v. FOSTER.

(Knoxville. September 18, 1888.)

1. SPECIFIC PERFORMANCE. *Contracts enforceable. "Options." Consideration.*

Defendant having bid off lands held in common by complainants and others, at a chancery sale thereof for partition, and not being able to give the required security for the purchase price, agreed in writing with complainants that, in consideration of their waiver of such security, they should have the option to purchase the lands from him, at any time within two years, at the amount of his bid, with interest. The sale was reported and confirmed, and title vested in defendant pursuant to this agreement. Complainants having elected, within the two years, to purchase the lands at the price stipulated, offered to perform said agreement, and demanded conveyance, which was refused by defendant. Complainants filed bill for specific performance.

*Held:* That said agreement is supported by a sufficient consideration; that it was irrevocable by defendant, and stood open for complainants' acceptance at any time within two years; and that complainants, having within that period exercised their option to take under it, and tendered performance, are entitled to specific performance thereof.

Cases cited and approved: *Cherry v. Smith*, 3 Hum., 19; 8 Wall., 358.

Case cited and overruled: *Gillespie v. Edmondson*, 11 Hum., 553.

2. SAME. *Same. Effect of subsequently given notes.*

Complainants' right to specific performance of such agreement is not affected by the fact that defendant, after its execution, gave security on his notes for the purchase price of the land, especially if the security given was not solvent, and, although accepted by the Master, would have been rejected on exception by the parties.

3. SAME. *Same. Purchase of entire estate by a tenant in common.*

Nor by the fact that defendant's agreement was made with, and for the benefit of, only part and not all the tenants in common. A tenant in common may legally purchase the entire estate for himself in such case. A third person could not, however, make the question if the purchase were illegal.

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Bradford v. Foster.

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4. SAME. *Same. Champerty.*

Nor by the fact that complainants, in order to raise money to pay for the lands, had contracted a portion of it to third persons who were not parties to the original agreement. Such contract is not champertous.

5. SAME. *Tender. By check. Waiver of objection.*

Objection that tender of the price of land, in an action for specific performance of a contract for its sale, was made by check accompanying the bill, cannot be made after final decree, upon petition for rehearing.

(See Polk v. Mitchell, 85 Tenn., 634.)

6. SAME. *Same. Same. Check is not payment.*

The check should, in such case, be treated as a mere offer to pay the money into Court, and not as payment; and, in the event of a decree in complainant's favor, he should be required to pay the money into Court.

7. SAME. *Same. Tender unnecessary.*

Formal tender of the purchase price of land is not required of the vendee before making application for specific performance of the contract of sale, where the vendor denies all liability under the contract.

(See Pearson v. Douglass, 1 Bax., 151.)

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FROM MARION.

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Appeal from Chancery Court of Marion County.  
S. A. KEY, Ch.

W. D. SPEARS, BROWN & POPE, and DODSON & MOON for Complainants.

N. H. BURT for Defendant.

LURTON, J. This is a bill filed to obtain the specific performance of an agreement for the sale of certain mountain lands described in the plead-

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 Bradford v. Foster.
 

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ings. The contract of sale was executed by the defendant Foster, and is as follows:

"J. W. BRADFORD <i>et al.</i> <i>v.</i> SARAH A. LEATMAN <i>et al.</i>	}	In Federal Court at Chattanooga, Tenn.
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"I, as purchaser of the lands in this case at public sale, under decree in this cause, on the 29th of June, 1885, at the price of \$2,650, agree with Messrs. Dodson & Moon, attorneys for complainants, that in consideration that the said Dodson & Moon, attorneys, consent that my individual notes be taken without security for the amount of my bid, I will and do hereby consent that they, for their clients, the complainants, shall have the right to purchase from me the lands sold in the above case, and purchased by me, by paying to me the amount of my bid, with interest, at any time within the next two years from this date, it being optional with them to purchase said lands.

"CHARLES FOSTER."

The facts necessary to a proper understanding of this agreement are these: Patterson B. West had died intestate, the owner of several large tracts of mountain lands. His heirs were numerous, and scattered through several States. Some years after descent cast, J. W. Bradford, one of these heirs, who was entitled to an interest of one-fifteenth, filed an original bill in the Federal Court at Chattanooga praying for a sale of these West lands.

All the other heirs were made defendants. Chas. Foster, who for many years had acted as the agent for the heirs in looking after this property, intervened by petition, and was allowed to assert a claim for compensation due him as such agent. Such proceedings were had as culminated in a decree in favor of Foster against the heirs for about \$2,000. The lands were, under the prayer of the original bill, ordered to be sold upon a credit of six, twelve, and eighteen months, except a cash payment of five per cent. The purchaser was required to execute notes with personal security for the deferred payments. The proceeds of sale were decreed to be applied, first to the payment of costs and attorneys' fees, second to the payment of the decree in Foster's favor, and remainder to the heirs entitled. At the sale had under this decree Foster bid in the lands at the price of \$2,650, but was unable to give solvent personal security upon his purchase notes, as required by the decree. To meet this difficulty the contract above set out was entered into between Messrs. Dodson & Moon, counsel for complainant, but who likewise represented two of the defendants, Mrs. Cowden and Mrs. Fall, sisters of J. W. Bradford, the original complainant. These three interests together represented a one-fifth share in the West lands, and these parties are the complainants, and claim to be equally interested under the contract made by their attorneys, Dodson & Moon. The relief sought is resisted upon several grounds, which have been very



earnestly pressed upon us by the solicitor for defendant. The first and perhaps principal defense interposed, both by demurrer and answer, is that the contract is unilateral, and is without consideration, and hence, upon both grounds, null and void. The contract in question, when analyzed, is nothing but an offer to sell the lands mentioned therein for a price specified at any time within two years. The party to whom the proposal is made is not, of course, bound to take the lands; he is given an option to do so or not, as he may elect.

It is claimed that the fact that the proposed vendee is not bound to take the lands makes the contract a nullity, and that the vendor cannot, or ought not, be compelled to perform a contract which he could not compel the vendee to comply with. This is unsound. Before acceptance by the vendee the vendor could not compel him to take the land, but after acceptance the vendee would be as much bound as the vendor.

Before acceptance such an agreement can be regarded only as an offer in writing to sell upon specified terms the lands referred to. Such an offer, if based upon no consideration, could be withdrawn by the seller at any time before acceptance. It is the acceptance, while outstanding, which gives an option not given upon a consideration vitality. If, however, an offer to sell is made in writing, and for a valuable consideration time is given within which it shall stand open for acceptance, such an option is irrevocable. It is based upon a

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Bradford v. Foster.

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consideration, and has all the elements of a contract. Such a contract is a conditional agreement. Upon the vendee accepting the offer, a contract of sale between the parties is complete.

The case of *Gillespie v. Edmondson*, 11 Hum., 553, is apparently in conflict with the view here announced. It is likewise in conflict with the early case of *Cherry v. Smith*, 3 Hum., 19. The learned judge writing the opinion in the latter case is the author of the opinion in the earlier case, and yet it is not cited. We are of opinion that the opinion in the case of *Cherry v. Smith* is the sounder view of the law, and the case of *Gillespie v. Edmondson*, in so far as it conflicts with *Cherry v. Smith*, or the views herein announced, is overruled. The view we have taken has the support of the great weight of authority, and clearly rests upon the well recognized principles governing contracts. 2 Parsons on Contracts, 375; Pomeroy on Contracts, Secs. 167 and 170, and pages 235, 238; *Willard v. Taylor*, 8 Wall., 358.

At the September Term, 1887, of this Court, in an unreported case of *Bull v. Beeson*, we announced the view herein expressed. The contract under consideration rested upon a valuable consideration—the assent of Dodson & Moon, complainant's counsel, to a confirmation of the bid of Foster without solvent personal security upon the purchase notes.

That Foster, in fact, gave notes with the signature of a surety attached is of no importance. This was after the agreement with Dodson & Moon, and the

surety given was confessedly insolvent, and an objection upon the part of Dodson & Moon would undoubtedly have prevented confirmation, although the Clerk had accepted the surety offered. That Dodson & Moon did not represent all the parties is not material; they only contracted for themselves and their clients. If another party had interposed objection to the confirmation it would probably have defeated confirmation; but in this result complainants would likewise have suffered the loss of their option. The defeat of the sale to Foster would have annulled the option to complainants.

It is next urged that inasmuch as this agreement was not made for the benefit of all the tenants in common interested in these lands, but alone for the benefit of such of them as were represented by Dodson & Moon, that it operated as a fraud upon the other heirs, and ought not to be enforced. Whatever may be the rights of the co-tenants of complainants to share in the benefit of the contract made by complainants, it is not an objection which can be urged by defendant. Indeed, in the absence of fraud, we can see no objection to one co-tenant becoming the purchaser of the entire estate, either at the Master's sale or from a purchaser at such sale. The sale was had for the very purpose of severing their interests, and we know of no rule of law or ethics which was violated by the agreement in question.

The objection that the complainants have parted with a part of their interest under this contract

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Bradford v. Foster.

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is next urged. The proof shows that the complainants have entered into an agreement by which certain other persons, not parties to the contract, have agreed to furnish the money necessary to complete the purchase from Foster in consideration of a portion of the lands. This is entirely legal. We cannot see how such an arrangement can be deemed champertous. The agreement, as proven, is nothing more or less than the sale of an interest in the option.

The refusal of defendant, when approached by the attorney of complainants, to even consider the question of a re-purchase, and his contention that he was not bound by his agreement, rendered a formal tender of the purchase money a meaningless form. This bill was thereupon filed, and within the two years allowed for a re-purchase. The bill tendered to defendant the purchase money and interest, and as an evidence of good faith and willingness to comply there was filed with the Clerk a check for the amount due, payable to the Clerk and Master. That this check has not been cashed is doubtless due to the fault of the Clerk or his deputy in never presenting the same. Defendant could at any moment have caused its presentation for payment, or asked a rule upon complainants to have the money paid into Court thereon. No objection was taken by demurrer or otherwise to the form of tender made by the bill. On the contrary, defendant, by demurrer and answer, has at all times strenuously denied the right of complainants to compel him to convey the lands under his agreement.

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Bradford v. Foster.

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The objection that the tender of payment made in the bill was by check came too late, it being made after final decree, and upon petition for rehearing. The plea of ignorance of the disposit of the check with the Clerk is no excuse for such delay. The check, however, cannot be treated as the payment of the money into Court, it must be held as a mere offer to pay, supported by a check as an evidence of willingness and good faith. It follows that the Chancellor was in error in treating the purchase money as having been actually in Court. Title will not be divested until complainants pay into Court the full sum of \$2,650, with interest from date of Foster's purchase to date of such payment. They will be allowed thirty days from date of filing this opinion to pay the fund into the hands of the Clerk of this Court, or the Clerk of the Chancery Court. Upon doing so title will be divested. A sufficiency of this fund may be impounded by complainants upon giving bond in double the amount of the fund retained, conditioned to pay all costs and damages resulting from improperly retaining such fund, to meet any decree that may be recovered against defendant on account of waste committed by him while the option was outstanding. The cause will be remanded for an account of such waste, under proper decrees to be entered hereafter. The costs of the appeal will be divided between complainants and defendant Foster. The decree of the Chancellor, except as herein modified, will be affirmed.

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McBrien & Holly v. Martin.

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## McBRIEN &amp; HOLLY v. MARTIN.

(Knoxville. September 18, 1888.)

1. WITNESS. *Competency. Interested, but not a party.*

A person *interested in* but not *party to* a suit against an administrator, is a competent witness therein for either party. *Interest* constitutes no disqualification.

Code construed: § 4565 (M. & V.); § 3813d (T. & S.).

Cases cited and approved: *Fuqua v. Dinwiddie*, 6 Lea, 646; *Hudgins v. Fanning*, 4 Bax., 578; *Godfrey v. Templeton*, 85 Tenn., 161.

2. SAME. *Case in judgment.* \*

In a suit against an administrator to recover money paid to the deceased for the plaintiff's benefit, the person making the payment is a competent witness to prove that fact.

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FROM HAMILTON.

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Appeal in error from Circuit Court of Hamilton County. S. A. KEY, Ch., sitting by interchange.

W. L. EAKIN for McBrien & Holly.

SHEPHERD & FRAZIER for Martin.

CALDWELL, J. Martin sold a horse to Ramsey for \$100, and took his note for the purchase money.

The note was placed in the hands of Simpson for collection.

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McBrien & Holly v. Martin.

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Simpson afterward died testate, and McBrien & Holly were qualified as his executors.

Martin, claiming that Simpson had collected the note and failed to pay the money over, brought this suit against the executors, before a Justice of the Peace, to recover the amount so claimed to have been collected and converted by Simpson.

The case was taken into the Circuit Court at Chattanooga by appeal, and there tried by the presiding Judge without the intervention of a jury, and judgment rendered for the plaintiff below for \$112 and costs.

A new trial being refused, the executors appealed in error to this Court.

The only direct proof of payment to Simpson was made by Ramsey, the debtor. He testified positively that he paid the note to Simpson.

To this testimony the executors excepted on the trial below, and upon the action of the Court in admitting it they here assign error.

The contention is that the evidence was incompetent, and should have been rejected because Ramsey, the witness, was directly interested in the result of the suit, and because he was testifying as to a transaction between himself and a deceased person, against whose estate his testimony operated to fix a liability.

The interest of the witness, and the nature and effect of his testimony, are as thus contended for, but it does not follow that the testimony is not competent.

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McBrien & Holly v. Martin.

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Disqualification on account of interest in the litigation was removed by § 4563 of the Code (M. & V.). The case before us is not embraced in the exception made by § 4565 of the Code, which is in these words:

“In actions or proceedings by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, *neither party* shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party.”

Clearly this exception is made with respect to *parties* only, and does not include *interested persons* who are not parties.

*Fuqua v. Dinwiddie*, 6 Lea, 646; *Hudgins v. Fanning*, 4 Bax., 578.

In the case of *Godfrey v. Templeton*, 2 Pickle, 161, referred to by learned counsel for appellants, the excluded witnesses were not only *interested* in the result of the litigation, but they were also *parties*, seeking recoveries against the administrator of a deceased partner.

The testimony of Ramsey was competent, and the assignment of error upon its admission is not well taken.

The other assignments of error, which need not be stated, are likewise not well taken.

Let the judgment be affirmed, with costs.



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McBrien & Holly *v.* Martin.

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PARTIES AS WITNESSES.

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Decisions not embraced in note to *Godfrey v. Templeton*, 86 Tenn., 168-171:

1. Parties are not entitled to fees for attendance as witnesses. 6 Heis., 92.
2. Parties to a suit on a proven account from another county are competent. 8 Bax., 396, overruling 6 Heis., 329.
3. Stockholder competent to prove transactions had with deceased in suit between the administrator and the corporation. 86 Tenn., 355.

## CLIFT v. CLIFT.

(Knoxville. September 22, 1888.)

1. DOWER. *In lands held in common. Assignment.*

A widow is entitled to dower in all lands of which her husband died seized and possessed, whether held by him in severalty or *as tenant in common*; and where there are several distinct tracts—some held in severalty and others in common—the entire dower may, under our statutes, be laid upon one or more of the tracts held in severalty, and need not be apportioned with exactness among the several tracts.

Code cited: §§ 3244, 3249 (M. & V.); §§ 2398, 2403 (T. & S.).

Case cited and approved: Walker v. Walker, 6 Cold., 571-581.

2. SAME. *In coal mines. Assignment.*

A widow is entitled to dower in coal mines, on lands of which her husband was owner either in severalty or in common, and operated at time of his death by lessees who paid certain stipulated "rents and royalties;" and a just and proper method of assigning such dower is to give her one-third of the proceeds derived from the mines to her husband's share.

Cases cited and approved: 1 Vern., 218; 1 Taunt, 402; 1 Law, 460; 10 Pick., 460; 45 Maine, 493; 6 Munf., 134; 1 Rand., 258; 61 Ind., 473; 73 Ill., 405; 13 N. J., 384.

3. SAME. *Lands sold by heirs. Value.*

If in assigning to the widow out of the remaining lands an equivalent for her dower in other lands sold by the heirs, the Commissioners adopt the price realized by the heirs as the true value of the land sold, the heirs are estopped to complain.

4. SAME. *Assignment. Province of Court. Direction to commissioners.*

In proceedings for assignment of dower the Court may, and, in complicated cases, should determine such questions and give such directions, in advance of the assignment, as are requisite to enable the commissioners appointed to discharge their duties properly, and such as will prevent litigation, delay, and expense in contests over their report.

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5. SAME. *Account for rents.*

In proceedings for assignment of dower the widow is entitled to an account for rents against the heirs.

Cases cited and approved: *Summers v. Donnell*, 7 Heis., 565; *Lewis v. James*, 8 Hum., 537; *London v. London*, 1 Hum., 1.

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FROM HAMILTON.

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Appeal from the Chancery Court of Hamilton County. D. C. TREWHITT, J., sitting by interchange.

SHEPHERD & FRAZIER and JOHN L. KENNEDY for Complainant.

RICHMOND & CLARK and CLIFT & CANTRELL for Defendants.

FOLKES, J. This is a bill by the widow against the administrator and heirs of William Clift, deceased, for year's support, homestead, and dower.

It is charged in the bill, and the proof establishes, that the deceased owned quite a quantity of real estate, consisting of several pieces of improved agricultural lands, some wild lands, and several hundred acres of coal lands, as also some mill property.

The wild and unimproved lands were held by the deceased as a tenant in common with others; the mining lands being also held as a tenant in common.

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The bill alleges that the widow was not fully informed as to the real estate owned by her deceased husband, and seeks a discovery from the heirs, who are charged with being in possession of the title papers, as to the number of pieces, where and how situated, and the condition of the title of the respective pieces, some of it being said to be involved in litigation.

After properly overruling the demurrer, which we do not deem it necessary to discuss in this opinion, the Chancellor, after answer filed, directed a reference to the Master for a report as to the several pieces of land owned by the deceased; and upon report of the Master, showing the number, character, and location of the lands, entered a decree appointing Commissioners to allot dower, and directing that they ascertain the value of all the lands owned by the deceased (except the mining lands and the lands in litigation), including the value of the lands sold by the heirs since the death of the ancestor, and including the value of his interest in lands held in common with others, and that they assign to complainant, by metes and bounds, one-third part in value of all of said lands and interest, placing the dower upon the lands which the deceased owned in his individual right. The Commissioners were instructed not to take into account the lands the title to which was in litigation, but as to such lands the cause was to be retained in Court to await the result of such litigation, and if gained by the heirs the dower would thereafter be

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assigned. As to the lands upon which the coal mines were being worked prior to and at the death of the husband by the lessees thereof, under a lease for ninety-nine years, at a fixed rent or royalty per ton for all coal taken out, the Commissioners were authorized to assign to the widow one-third of the rents and royalties to which her husband was entitled, to be held by her from the date of his death for and during her life, unless the coal and minerals should be sooner exhausted, in which event she is to be entitled to have and enjoy one-third of Wm. Clift's interest in said lands covered by said mineral leases. The Chancellor further decreed that the title of the widow to dower should relate back to the death of Wm. Clift, and that she is entitled to one-third of the rents of the mines, and to all the rents of the homestead and dower lands which may be assigned to her from the date of the death of her husband.

The Master is directed to take proof and report what amount of rents and royalties have accrued upon Wm. Clift's share of the coal and mineral lands since his death, and who has received the same.

The decree further provides, that in assigning dower the Commissioners shall not be compelled to assign her a third part of each separate tract, but may make the assignment according to quality and quantity, in such manner as will give her one-third in value of the whole estate, having due regard to timber lands, etc.

From this decree defendants alone pray an appeal, and the Chancellor, being of opinion that it was a proper case for the exercise of the discretion given him under § 3157 (T. & S.) of the Code, to award an appeal from an interlocutory decree fixing the rights of parties and ordering an account, granted the appeal.

Appellants make no question here as to the action of the Chancellor in awarding year's support and homestead. And they admit the widow's right to have estimated, in assigning dower, the value of the lands sold by them since the death of the ancestor, amounting to some twenty-four or twenty-five thousand dollars.

The objection urged and pressed upon the attention of this Court in the assignment of errors is, that the widow is not entitled to dower allotted as to lands held by her husband as a tenant in common with others; and that as to the mining lands the decree is erroneous, both because of the fact that the husband's interest is that of tenant in common, and because the wife is given an interest in the rents and royalties resulting from the operation of the mines, the contention in this connection being that to allow her to reap the fruit of the mines is *pro tanto* a destruction of the inheritance to the injury of the heirs.

None of the objections are well taken.

The Chancery Court has jurisdiction to allot dower, and, as incident thereto, to compel production of title papers, and the discovery of any mat-

ters necessary to a proper ascertainment of the condition of the landed estate of the husband in the possession of the heirs. M. & V. Code, § 5045; Story's Eq. Jur., § 629*n*.

By statute in this State the widow is entitled to dower in one-third part of all the lands of which her husband died seized and possessed, or of which he was equitable owner. Code, § 3244.

And in assigning dower "the Commissioners shall not be compelled to assign a third part of each separate tract of land where there are more than one, but may make the assignment, according to quality and quantity, in such manner as will give her (the widow) one-third in value of the whole estate." Code, § 3249.

This is substantially what the Chancellor has directed in this case.

The Commissioners are told that in assigning dower regard should be had to the value of the lands held by the husband as tenant in common.

This was proper, for the reason that she could not have dower assigned by *metes and bounds* out of the property held as a tenant in common without or until there was a partition of the property so held, as is decided by this Court in *Walker v. Walker*, 6 Cold., 571-581, and if the record here, as there, disclosed that there was no other property except such as was held in common with others, it would be proper to let allotment of dower await a partition which the widow might have made, if the heirs failed or neglected to do so, provided the

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property was of a character that could be partitioned in kind without injury thereto, and if no partition could be had, the property might be sold, and the widow have her dower assigned out of the proceeds of her husband's interest. See, in this connection, Code, § 3250.

It seems, however, that in such case, if the widow should prefer it, she may have assigned to her one-third of the share of her husband, to hold in common with the heir and other tenants. *Scrib. on Dower*, Ch. IV., § 17, and cases there cited. Be this as it may, it is not necessary for the purposes of this case to decide.

But in the case at bar there are a number of different tracts of land held in severalty, out of which dower can be assigned, and in making such assignment the Commissioners are told to take into consideration the value of the husband's interest in the lands held by him as a tenant in common.

Whatever might be said of the widow's right to complain of this part of the decree, as to which it is not necessary nor proper to decide, because she does not appeal, it is quite clear that the heirs cannot object.

Nor is there error in the decree giving the widow one-third of her husband's share in the rents and royalties received from the several different mines leased to several different parties or corporations.

The amount of the royalty fixed in the leases, and the share of the husband in the several pieces of land being made to appear, it is easy to arrive,



by a simple calculation, at the portion thereof that should be assigned to the widow. Indeed, under the facts of this case it is the only practicable means of allotting dower with any degree of justice to the widow or to the heirs.

The long lease prevents the property from being partitioned so as to permit of an allotment by metes and bounds. Nor can the value of the husband's interest be arrived at with any degree of accuracy so as to charge it upon other property held in severalty, out of which dower can be assigned.

The value of the property upon which the mines are being worked is dependent entirely upon the quantity of coal or ore contained in them. There is proof tending to show that the mines are now nearly exhausted, although this fact cannot be known, but only arrived at from indications which are more or less deceptive. Nothing but the continued working of the mines can disclose the quantity or quality of the minerals reposing in the bowels of the mountain, and the consequent value of the land.

If estimated as of great value, and placed upon other property, the heirs would be injured if the minerals should be soon exhausted, and *vice versa*.

This being manifestly just, let us see if authority is wanting to sustain it.

In 2 Scribner on Dower, Ch. IV., § 17, it is said, speaking of property indivisible in its nature, the widow must be content with a special endow-

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ment. "Thus, if the husband die seized of a mill, she may be endowed either of the third toll dish, or of a third of the profits, or of the entire mill every third month. So, if the property be a ferry, one-third of the profits, or the use of the ferry for a third part of the time in alternate periods, should be set apart to the widow." Citing several cases. See *Hoby v. Hoby*, 1 Vern., 218, and the leading case of *Stoughton v. Leigh*, 1 Taunt., 402. While there was some vacillation in the earlier English cases, the Courts of this country seem uniformly to allow dower in mining property, certainly in all cases where the mines had been opened in the life of the husband. See *Coates v. Cheever*, 1 Law, 460; *Billings v. Taylor*, 10 Pick., 460; *Moore v. Rollins*, 45 Maine, 493; *Findlay v. Smith*, 6 Munf., 134; *Crouch v. Puryear*, 1 Rand., 258; *Hendrix v. McBeth*, 61 Ind., 473; *Lenfers v. Henke*, 73 Ill., 405; *Malone on Real Prop. Trials*, pages 633-4; *Rockwell v. Morgan*, 13 New Jersey, 384.

We hold, therefore, that dower is assignable to the widow in mines, quarries, and the like, and she may enjoy the same, either by an allotment by metes and bounds, or by a share of the rents and royalties where the mines or quarries were opened and operated in the life of the husband, whether the same be operated by the husband or by lessees paying rent or royalty on the yield.

And in determining the mode to be adopted in each particular case regard should be had always to the interest of the widow, and the widow is

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entitled to an account with the heir for the rents and profits from the death of the husband. See *Summers v. Donnell*, 7 Heisk., 565; and *Lewis v. James*, 8 Hum., 537; *London v. London*, 1 Hum., 1.

There is one other objection made to the decree which it may be proper to notice. It is this: that even if it be conceded that dower should be assigned in the manner directed by the decree, the Chancellor was in error in undertaking, in advance, to direct the Commissioners, being, as is claimed, an encroachment upon the discretion which the law reposes in the Commissioners.

It is true that the Commissioners have a large discretion in the matter or manner of allotting dower, and ordinarily they should be left to its free exercise, subject to the power and duty of the Court to control their action upon the coming in of the report.

But in a case of the character of the one at bar, where the record discloses a complicated state of affairs with reference to the condition of the property, and raising questions of dispute between the widow and heirs as to their relative rights, it is not only not reversible error, but it is eminently proper for the Court to settle in advance the rights of the parties, and to give instructions to the Commissioners which will tend to remove manifest difficulties and shorten the litigation, delay, and expense which would result from allowing the Commissioners to fall into error, and then correcting

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the same by setting aside the report and recommitting the matter to the Commissioners for further action.

Let the decree be affirmed at the cost of appellants, and cause remanded for further proceedings thereunder.

OPINION ON PETITION TO REHEAR.

FOLKES, J. Defendants have filed petition for rehearing in this cause, or for a modification of the decree.

The first objection is, that the decree "gives dower twice in the same lands." This idea is predicated upon the language of the decree, which directs the Commissioners to estimate the value of lands of deceased, including the value of the lands held in common and place same upon lands held severally. Then, in another and distinct part of the decree, it is directed that the widow have dower, in the coal mines, awarded by giving to her one-third of the rents and royalties issuing therefrom.

The defendants, in their petition, say that this will result in giving the widow dower twice; that is, the coal lands, being held in common, will be included in the value of the estate and placed upon the lands held in severalty, and after this is done she would have, in addition thereto, one-third of rents and royalties in the same lands that have already been estimated in fixing value of

lands held in common.<sup>†</sup> Such an apprehension is altogether groundless. It is to be presumed, that the Commissioners will read the decree correctly, and if they do they will clearly see that there are other lands held in common by the deceased, exclusive of the coal mines, to which they will be confined in placing value of lands held in common upon the lands held in severalty, and that the value of the coal mines yielding rents and royalties will not be included in such estimate, for the very manifest reason that as to such coal lands a separate and distinct provision is made. In other words, there being other lands held in common, to which the general language of the decree can apply, and a specific provision for the coal lands yielding royalties, the specific direction would control the general provision, and confine the estimate of value to the lands held in common, other than the coal lands.

If by any possibility the Commissioners could err in the construction of the decree, the Chancellor would set them right, in exceptions to their report, so there is no necessity for changing the decree of the Chancellor, which was merely affirmed here without being written upon the minutes, as is proper where there is no modification of the decree below, and cause is remanded for the execution of the decree as made below. It is next insisted that the decree, in giving dower in the rents and royalties of the coal lands, operates as a hardship upon the rights of the co-tenants of the

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deceased husband in such lands—who are not parties to this suit—by preventing them from having partition of such coal lands, should they hereafter desire to do so. We are unable to see how the payment to the widow of one-third of the husband's share in the rents and royalties will hurt the co-tenants, or prevent their having a partition, should they desire in good faith to partition coal lands, which are being operated by their lessees under a ninety-nine years lease, as seems to be the case with most of the coal lands in question. If they should desire it, however, they would have to do so either by contract *inter sese* in which the widow would be competent to join, if they could agree, and if not, then they could resort to original legal proceedings, which would not be embarrassed by the decree which we have affirmed in this cause.

If the partition is postponed until the end of the lease the probabilities are that the subsequent proceeding will interest the widow no further.

It is also urged in the petition for rehearing that, as some of the coal lands yielding rents are in litigation, the widow should be required to give a refunding bond to protect the lessees against a double payment, should the litigation result in the defeat of her husband's title.

This is a question not before us on the appeal in this cause, which was one allowed by the Chancellor to an interlocutory decree fixing the rights of the widow against the heirs, and giving directions as to allotment of dower. Our decree here

merely affirms the action of the Chancellor, so far as he has gone, and it is presumed that he will make such further decrees and orders as may be proper and necessary in the progress of the cause.

As the record is now before us, we have no more right or power to direct the widow to give a refunding bond than we have to direct the heirs to do so, and there is nothing in the record intimating that the claimants of the title in litigation, or the lessees of the mines, are any more interested, or urgent, in demanding security from the widow, than they are from the heirs, or from the co-tenants.

Certainly we would not require the widow to give such a bond on the motion of the heirs, who alone appealed to this Court.

The next objection to the decree is that the purchase money actually received by the heirs for the sale of certain of the lands, made by them after the death of the husband, should not be considered by the Commissioners in fixing the value of the estate, out of which the widow is to have dower, but the Commissioners must for themselves estimate the value of the lands now.

This objection is not well taken. Where heirs take upon themselves to sell lands and receive the purchase money, without consulting or providing for the widow's dower, they will not be heard to show that the property was worth less than they sold it for at the time, or that it has depreciated since the sale, while the widow has

been in litigation with the heirs in the effort to obtain her dower rights.

The petition also objects to the law of the case as decided by this Court in the opinion heretofore rendered concerning the allowance of dower in the rents and royalties.

As there is nothing advanced upon this question by the petition that was not pressed in the original argument, and disposed of in the opinion, we deem it unnecessary to add anything to what has already been said thereon.

The petition will be dismissed with costs.



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The Bank v. Buchanan.

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THE BANK v. BUCHANAN.

(Knoxville. SEPTEMBER 25, 1888.)

PRINCIPAL AND SURETY. *Discharge of surety. Renewal with forged note.*

Sureties are not discharged from liability on their note, where, without fraud or negligence of the payee, their obligation is surrendered upon the faith of a renewal note to which their insolvent principal has forged the names of other sureties. The forged note, being void, does not satisfy the original note.

Cases cited and approved: *Wade v. Street*, 2 Head, 609; *Wright v. Overall*, 2 Cold., 345; *Naff v. Crawford*, 1 Heis., 124; *Kirtland v. Railroad*, 4 Lea, 421; *McNairy v. Marshall*, 7 Hum., 229; *Hubbard v. Fravell*, 12 Lea, 304; *Box v. McElvey*, 8 Heis., 861; 37 Ind., 68; 73 Penn. St., 400; 3 Hawk's, N. C., 568; 3 Penn., 330.

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FROM M'MINN.

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Appeal from the Chancery Court of McMinn County. S. A. KEY, Ch.

W. D. HENDERSON for Bank.

W. L. HARBISON for Defendants.

FOLKES, J. This is a bill by the bank to recover of Hale and Carver the sum of \$85, being the amount of a note made by Buchanan, Hale, and Carver jointly, and discounted by the bank for the benefit of Buchanan, the other makers being,

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as between the parties, sureties for Buchanan, credit being given solely to Hale and Carver.

At its maturity said note was surrendered and canceled upon the delivery to the bank by Buchanan of another note for the same amount, purporting to be executed by said Buchanan, and McKamy and Bond, which was accepted by the bank in renewal of the first note. The last note was surrendered and canceled at maturity, upon the delivery to the bank of a note for \$275, purporting to be executed by Buchanan, McKamy, and Bond; this note being taken in renewal of the second note for \$85, and for the advance or loan of the difference between the face of the note and the \$85. Upon default being made in the payment of the last note, and proper steps being taken to collect the same, it was developed that the signatures of McKamy and Bond were forged to both notes upon which their names appeared, and that Buchanan had fled the country.

This suit is now brought to recover the amount of the principal and interest on the genuine note of Buchanan, Hale, and Carver, upon the ground that the note of Buchanan, McKamy, and Bond, taken in renewal thereof, being a forgery, was absolutely void, and not operative as a satisfaction and discharge of the debt represented by the genuine note.

The Chancellor gave decree for complainant, and defendants Hale and Carver have appealed.

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For appellants it is insisted that the debt sued on has been paid off and discharged, and that the extension of time given to the principal debtor by the acceptance of renewal notes operated to discharge them as sureties.

There is no error in the decree. It is well settled that payments in forged paper, spurious bills, or in base coin is void, and leaves the original debt in full force and effect, where there has been no fraud nor improper conduct on the part of the party receiving such forged paper; alike, whether it be received in payment of an antecedent debt, or for the payment of goods or other present consideration. See *Anderson v. Hawkins*, 3 Hawk's (N. C.), 568; *Ramsdale v. Horton*, 3 Penn., 330.

In *Wade v. Street*, 2 Head, 609, this principle is announced, although it was not the point adjudged in the case, the question there being as to the solvency, not the *genuineness*, of certain bank notes given in payment of a debt.

This announcement being distinctly recognized in *Wright v. Overall*, 2 Cold., 345, in *Naff v. Crawford*, 1 Heis., 124, and in *Kirtland v. M. & T. R. R.*, 4 Lea, 421, although in these cases, as in the first, it was not the point decided. See also *Box v. McKelvey*, 8 Heis., 861.

In *Allen v. Sharpe*, 37 Ind., 68, the case is made substantially as presented here, and decided in the same way. To the same effect is *Ritter v. Lingmaster*, 73 Penn. St., 400.

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There being no pretense of bad faith, or any negligence or improper conduct on the part of the bank, the fact that these defendants were sureties can make no difference, it being equally as well settled that the fraud of the principal, without participation of the creditor, will not release the sureties. *McNairy & Hay v. Marshall*, 7 Hum., 229; *Hubbard v. Fravell*, 12 Lea., 304.

Let the judgment be affirmed with costs.

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Davis v. Norvell.

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## DAVIS v. NORVELL.

(Knoxville. September 25, 1888.)

1. INQUISITIONS OF LUNACY. *Practice in County Court in cases of concurrent jurisdiction.*

Inquisitions of lunacy had in County Courts, in that class of cases of which the Chancery Courts have concurrent jurisdiction, must conform, "as near as may be, to the rules and regulations laid down for the conduct" of such cases in the Chancery Courts.

Code cited: § 4976 (M. & V.); § 4196 (T. & S.).

Cases cited and approved: Dozier, *ex parte*, 4 Bax., 81; Albright v. Rader, 13 Lea, 574.

2. SAME. *Same. Notice. Waiver of copy of petition.*

Hence, in such cases, though not required in terms by the statutes regulating the practice in the County Courts, notice, accompanied by copy of the petition, must be served on the alleged lunatic; but if proper notice is served, without copy of petition, the irregularity is waived by failure to object in the Court below.

Code cited: §§ 4440, 4976 (M. & V.); §§ 3691, 4196 (T. & S.).

Cases cited and approved: 4 Bax., 81; 13 Lea, 574.

3. SAME. *Same. Reduction of evidence to writing.*

Hence also the County Court Clerk must, in such cases, preside over the deliberations of the jury, reduce to writing the examination of the defendant and the testimony of the witnesses, and return the same into Court with the verdict of the jury.

Code cited: §§ 4445-4447, 4946 (M. & V.); §§ 3696-3698, 4196 (T. & S.).

4. SAME. *Writ of error. Pauper oath.*

The alleged lunatic may prosecute a writ of error, in proper person and upon the pauper oath, from an adverse judgment in a proceeding of inquisition.

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FROM M'MINN.

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Writ of error to County Court of McMinn County.

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Davis v. Norvell.

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BURKETT, MANSFIELD & TURLEY for Davis.

W. L. HARBISON and ROBT. PRITCHARD for Norvell.

LURTON, J. Mary Davis, the plaintiff in error, was declared a person of unsound mind by the County Court of McMinn County. She has filed a transcript of the record, and obtained a writ of error upon taking the oath prescribed for poor persons.

The first error assigned is that she was not served with a copy of the petition of J. F. Norvell, the defendant in error, praying for a writ of inquisition against her. This would be error but for the fact that it appears that she was duly served with notice of the time, place, and object of the inquisition, and it does not appear that any objection was made because copy of petition had not been served upon her. This irregularity must be treated as waived.

The next assignment of error is that the record does not show that the defendant was examined by the jury, or that the testimony of the witnesses heard by the jury was reduced to writing by the Clerk and returned into Court by the jury with their verdict.

The article of the Code concerning proceedings in the County Court upon a writ of inquisition does not, in terms, require either the examination of the defendant or that the testimony shall be reduced to writing and returned with the verdict.

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Code, §§ 3681 to 3690 inclusive. On the other hand the article regulating procedure in the Chancery Court upon a writ of inquisition does expressly require both these things. Code, §§ 3691 to 3707 inclusive.

Where the estate of the defendant exceeds five hundred dollars in value, the jurisdiction of the County Court is concurrent with that of the Chancery Court. The case now under consideration was one of concurrent jurisdiction, the fact that the estate of the defendant exceeded five hundred dollars appearing upon the face of the petition as well as in the verdict of the jury. When the jurisdiction is concurrent, the practice prescribed for proceedings of a similar nature in the Chancery Courts must be pursued as near as may be consistent with the difference in the organization of the two courts. Section 4196 of the Code is as follows: "The mode of proceeding in the County Court, where the jurisdiction is concurrent either with the Circuit or Chancery Court, shall be, as near as may be, according to the rules and regulations laid down for the conduct of similar business in these courts." The sections regulating the jurisdiction and practice of the County Court in inquisitions of lunacy nowhere expressly require that any petition shall be filed, or copy served upon the defendant, or any notice to the defendant of the time and place of inquisition. Yet this Court, in two well considered cases, held, that in cases of concurrent jurisdiction the defendant is entitled to both copy of

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petition and notice. These cases do not, in terms, say that the other regulations prescribed for such proceedings in the Chancery Court are applicable to the County Court, but they do hold that section 4196 has application, and that the practice in the County Court must, as near as may be, conform to the regulations prescribed for such cases in the Chancery Court: *Dozier ex parte*, 4 Bax., 81; *Albright v. Rader*, 13 Lea, 574.

In cases of inquisition of lunacy, whether before the County or Chancery Court, the testimony is not delivered in court, but is heard only by the jury, and this furnishes a most potent reason why the evidence should be reduced to writing and returned into court with the verdict. By being so returned into court the testimony becomes a part of the record. In no other way could a bill of exceptions be obtained upon which the case might be reviewed upon the facts by an appellate court. Every consideration of justice to the most helpless and friendless class of our people demands a compliance with these most reasonable precautions against error and oppression. Neither is there anything in the organization and machinery of the County Court which will prevent a compliance with this regulation. We, therefore, hold, that where the jurisdiction of the County Court is concurrent with the Chancery Court, the Clerk of the County Court, or his deputy, must preside over the deliberations of the jury, and that he must reduce to writing the examination of the defendant and the



testimony of the witnesses heard by the jury, and that the evidence must be returned with the verdict of the jury into court.

The motion of defendant in error to dismiss the writ of error because prosecuted by Mary Davis in proper person, and because prosecuted *in forma pauperis*, is denied.

If it be assumed that she is *non compos mentis*, yet that affords no sufficient reason why she may not prosecute such a suit as this in her own name: *Rankin v. Warner*, 2 Lea, 302.

That all of her estate is in the hands of the guardian appointed under the proceeding under review, is a sufficient justification for the prosecution of this writ of error upon the oath prescribed for poor persons. The case will be remanded to the Court below, to be proceeded with under a new writ of inquisition if defendant in error shall be so advised.

The costs of the Court below, as well as of this Court, will be paid by defendant in error.

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Cate v. Cate.

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CATE v. CATE.

(Knoxville. September 27, 1888.)

VENDOR AND VENDEE. *Vendor's lien. Assignment of note as collateral.*

The *lien* or *equity implied*, in the absence of any reservation of an express lien, in favor of the vendor of land, as security for the purchase price, is not extinguished by the vendor's assignment of the notes given for the purchase price *as collateral security* for his debts.

Cases cited and approved: Green v. Demoss, 10 Hum., 371; Thompson v. Pyland, 3 Head, 537; Thorpe v. Dunlap, 4 Heis., 674; Cowan v. Sharpe, 11 Heis., 450; McWhirter v. Swoffer, 6 Bax., 342; Pillow v. Helen, 7 Bax., 545; 32 Ark., 258; 28 Ark., 66; 40 Miss., 778.

Cited and distinguished: Bowlin v. Pearson, 4 Bax., 343.

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FROM MEIGS.

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Appeal from Chancery Court of Meigs County.  
D. C. TREWHITT, J., sitting by interchange.

V. C. & N. Q. ALLEN and W. L. HARBISON for  
Complainants.

BURKETT, MANSFIELD & TURLEY for Defendant.

LURTON, J. This case involves the question as to whether the lien which exists in favor of the vendor of land, conveyed without reservation of an express lien, has been lost by the transfer of the obligation of the vendee as collateral security. Complainant N. L. Cate being indebted to his co-complainant, B. F. Lillard, assigned to him, as collateral security, a note which had been executed by the defendant, M. E. Cate, as part consideration for

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the sale of a tract of land, no lien having been retained in the deed of conveyance. This note was transferred to Lillard with the following indorsement: "This note is this day assigned to B. F. Lillard as collateral security to secure a debt of one thousand dollars and interest due him from me." At the time of the assignment Lillard executed a receipt for the note, reciting that it had been transferred as collateral security, and "is to be collected by me, and net proceeds to be applied to payment of the two notes due me as hereinbefore described, *the legal title to said note to remain in N. L. Cate*, but the right to collect and apply proceeds as herein indicated is conveyed to me." N. L. Cate and B. F. Lillard join in this bill and seek a decree subjecting the land sold defendant to a lien for the payment of this note. The doctrine that the vendor of land has an equity, often designated as a lien, to secure the purchase money, which may be enforced against the vendee and his heirs or assignees with notice, is well settled. The ground upon which the equity rests is much controverted, and it would perhaps be unremunerative to consider the opposing views. The doctrine originated in the English courts of equity, and they have steadily repudiated the idea that the equity is one personal to the vendor, and therefore hold that an assignment of the debt carries with it the lien. Pomeroy Eq. Juris., § 1254; *Dryden v. Frost*, 3 My. & Cr., 670; *Payne v. Baker*, 1 Giff., 241.

Whatever room there may once have been for controversy, it has long been settled in this State that the lien does not pass to the assignee of the vendee's obligations. *Green v. Demoss*, 10 Hum., 371; *Thompson v. Pyland*, 3 Head, 537; *Tharpe v. Dunlap*, 4 Heis., 674; *Cowan & Dickerson v. Sharpe*, 11 Heis., 450; *Bowlin v. Pearson*, 4 Bax., 343; *McWhirter v. Swoffer*, 6 Bax., 342; *Pillow v. Helm*, 7 Bax., 545.

The doctrine is thus stated by Judge McKinney in the leading case of *Green v. Demoss*: "But this lien is a mere personal, equitable right in the vendor, and is not assignable. It looks only to the security of the vendor, and does not pass to the assignee of the vendee's obligation for the consideration money, and consequently cannot be enforced in his favor. The assignment of the vendee's notes as obligations for the purchase money is not, however, *ipso facto* an absolute discharge or extinguishment of the lien; it is only so conditionally. The lien is to secure the payment of the purchase money to the vendor. If, upon a transfer by the vendor of the vendee's note or obligation the former be discharged from all ultimate liability upon his endorsement; or if the assignment were without responsibility, on the part of the vendor, for the payment by the vendee, in either case this would amount to absolute payment, so far as the vendor is concerned, and the lien would be extinguished. But if the vendor is made liable upon his indorsement, or voluntarily takes back the note,

the lien will be regarded as merely suspended in the meantime, and he will be remitted to his equitable right, and may enforce the lien against his vendee as if no such assignment had been made."

In Arkansas, where the lien is held to be non-assignable, the courts hold an assignment as collateral security not to defeat the lien. *Blevins v. Royers*, 32 Ark., 258; *Carlton v. Buckner*, 28 Ark., 66.

So in Mississippi, where the rule is as in this State, it has been held that where the assignor repossesses himself of the note the lien revives. *Stratton v. Gold*, 40 Miss., 778.

The note in the case now under consideration has never been assigned in the sense that the vendor has parted with his title. The debt due from him was not paid by the assignment; on the contrary, if the vendee fails to pay his note to Lillard the assignor will continue to remain liable for the whole of his debt to Lillard. The effect of the indorsement to Lillard and of the receipt given by the latter is to render the transaction nothing more or less than a simple deposit of the note by way of collateral security. Assenting, as we do, to the doctrine of the non-assignability of such a lien, and holding it to be a mere personal, equitable right of the vendor, yet the facts of this case take it out of the general rule. The vendor is still the legal and equitable owner of this debt, and entitled, therefore, to a decree enforcing his lien, the proceeds to be applied upon his debt due to Lillard according to the agreement between the parties.

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The case of *Bowlin v. Pearson*, 4 Bax., 343, is pressed upon us very zealously by the solicitor for the defendant as a case in point. That was a case of a bill filed in the name of the assignor for the use of the assignee, the note having been assigned. While it is true that the assignor had been made liable upon his indorsement, yet he had not repossessed himself of the note, nor had he brought any suit upon his own rights as an indorser. The case went off on the state of the pleadings, the Court holding that the lien had not passed to the assignee, and therefore he had no use for which the indorser could sue, the Court saying: "In equity, however, the party for whose use the suit is brought is the real party, and as he has no right to enforce, the bill must fail in any aspect of the case. Whether the indorser may or may not file a bill before payment of the note on becoming owner of it again, in this view makes no difference. He has brought no bill for his own use to enforce rights of his own, but only to enforce rights for his assignee, who has none."

It is easy to be seen that the case under consideration is to be distinguished from the one just referred to, and that it presents no real antagonism to the view herein expressed. The decree of the Chancellor will be affirmed in so far as to give to complainant, N. C. Cate, a decree for the debt and enforcing his lien, the net proceeds to be paid over on his debt to Lillard.

Appellant will pay costs of appeal.

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 Stevenson v. Ewing.
 

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## STEVENSON v. EWING.

(Knoxville. September 27, 1888.)

REAL ESTATE BROKERS. *Commissions. License.*

Real estate brokers are forbidden by Acts 1885, Ch. 1, § 46, to pursue their avocation *without license*; and an *unlicensed broker*, who, in violation of this act, negotiates the sale of land for another, cannot recover any compensation for his services. The *contract for compensation* in such case is illegal and void.

Act construed: Acts 1885, Ch. 1, § 46.

Cases cited and approved: Perkins v. Watkins, 2 Bax., 187; Ins. Co. v. Ins. Co., 11 Hum., 11; Hale v. Henderson, 4 Hum., 200; Dillon v. Allen, 46 Iowa, 299 (26 Am. R., 145); Holt v. Green, 73 Penn., 198 (13 Am. R., 738); McConnell v. Kitchens, 20 S. C., 430 (47 Am. R., 845); Wood v. Armstrong, 54 Ala., 150 (25 Am. R., 671); Johnson v. Heelings, 103 Penn., 498 (49 Am. R., 131); Johnson v. Hudson, 11 East, 100.

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 FROM HAMILTON.
 

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Appeal in error from Circuit Court of Hamilton County. D. C. TREWHITT, J.

A. C. DOWNS for Stevenson.

YOUNG & BARR for Ewing.

CALDWELL, J. Ewing was a real estate broker, doing business in Chattanooga. Claiming to have sold a house and lot for Stevenson, he brought

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this action, before a Justice of the Peace, to recover a sum alleged to be due him as commissions for the sale.

The case was appealed to the Circuit Court, and there tried. Verdict and judgment were in Ewing's favor for \$200. Stevenson has appealed in error to this Court.

In the Court below it was contended by Stevenson that Ewing had not paid the privilege tax and procured the license required by statute of persons pursuing his avocation, and that for that reason this suit could not be maintained.

The evidence tended to show that Ewing had not paid the tax and taken out license at the time he claimed to have made the sale. But the trial Judge, not agreeing with the defendant as to the law applicable, instructed the jury that the failure of Ewing to pay the tax and procure the license, if established, would not defeat this action.

This instruction is assigned as error.

The sale, for the making of which Ewing claims commissions, was made, if made at all, in February, 1887.

The Act of 1885, then in force, declares that the occupation of a real estate broker "shall be deemed a privilege, and be taxed, and *not pursued or done without license.*" Acts 1885, Ch. 1, Sec. 46.

Here is an express prohibition of all unlicensed persons to act as real estate brokers, and, consequently, a prohibition, by necessary inference, of all contracts which such persons shall make for



compensation to themselves for so acting. By the clear and unambiguous terms of the statute the real estate broker is forbidden to pursue his business "without license;" and, it follows that, if he presumes to do so, his acts are in violation of law, and all contracts for his benefit are illegal and void.

If he fails to equip himself with the required authority for the transaction of his business the law will deny him its aid when he seeks to enforce his contract for commissions.

We confine this holding, however, to the unlicensed broker's contract with his principal, and do not extend it to the independent contract made between vendor and vendee, whom he brings together.

Judge Cooley says:

"When the tax takes the form of a tax on the privilege of following an employment, convenience in collection will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the tax as a condition to the right to carry on the business at all. In such case the business carried on without a license will be illegal, and no recovery can be had upon contracts made in the course of it." Cooley on Taxation (2d ed.), p. 572.

It is familiar law, both in England and America, that a contract prohibited, either expressly or impliedly, by statute is illegal, and cannot be enforced. *Perkins v. Watkins*, 2 Bax., 187; *Ins. Co. v. Ins. Co.*,

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11 Hum., 11; *Hale v. Henderson*, 4 Hum., 200; Benj. on Sales (4th Am. Ed.), §§ 818, 825; Addison on Con., § 294; *Holt v. Green* (73 Penn., 198), 13 Am. R., 738; *Dillon v. Allen* (46 Iowa, 299), 26 Am. R., 145; *McConnell v. Kitchens* (20 S. C., 430), 47 Am. R., 845; *Wood v. Armstrong* (54 Ala., 150), 25 Am. R., 671; *Johnson v. Heelings* (103 Penn., 498), 49 Am. R., 131.

It is earnestly insisted by learned counsel for Ewing that the *sole purpose* of the Act under consideration is to raise and secure the collection of revenue, and not to prevent the business of real estate brokers as being against good morals or contrary to public policy; and that, such being the purpose of the Act, the Courts should construe it so as not to effect the validity of the contracts of such brokers, though made without license.

The rule of construction thus insisted upon is sound and well recognized.

But there is no room for its application in this case. It is called into requisition by the Courts, only when there is doubt, from the language of the statute itself, whether or not the Legislature intended to prohibit the exercise of the privilege without license.

We have already seen that no such doubt exists with respect to the language of the Act before us. The *prohibition* is distinct and absolute. That ends all construction.

Mr. Benjamin, in his excellent treatise on sales, reviews the leading English cases on this subject,

beginning with *Johnson v. Hudson* (11 East, 100), decided by the King's Bench in 1809, and from them declares these propositions:

“*First*, That where a *contract* is prohibited by statute it is immaterial to inquire whether the statute was passed for revenue purposes only, or for any other object. It is enough that parliament has prohibited it, and it is therefore void.

“*Secondly*, That when the question is *whether* a contract has been prohibited by statute it is material, in *construing* the statute, to ascertain whether the Legislature had in view *solely* the *security and collection of the revenue*, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case the inference is, that the statute was not intended to prohibit contracts; in the latter that it was.

“*Thirdly*, That in seeking for the meaning of the law-giver it is material, also, to inquire whether the penalty is imposed once for all, on the offense of failing to comply with the requirements of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealings. In the latter case, the statute is intended to *prevent the dealing*, or *prohibit the contract*, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced.”

2 Benj. on Sales (4th Am. ed.), § 825.

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This case falls under the first of the foregoing propositions; and not under the second, as counsel for the appellee has insisted.

It follows that the instruction of the trial Judge upon this point was erroneous.

He should have charged the jury as already indicated in this opinion.

It was also error to reject evidence, offered by Stevenson, tending to show great enhancement in the value of his property between the time Ewing claims to have become his agent and the time of the alleged sale.

This evidence was competent upon the question of good faith, which the law required the agent to exercise in the highest degree.

Reverse and remand for a new trial.

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4pi 534

THE STATE, *ex rel.*, v. McCLELLAN.

(Knoxville. September 27, 1888.)

1. CONSTITUTIONAL LAW. *Convicts' "good time" laws. Retrospective laws. Pardoning power.*

Statutes allowing to convicts certain credits on their terms of imprisonment in consideration of good conduct, are unconstitutional as to all sentences in force at time of their passage, as unauthorized exercise of pardoning power.

Constitution: Art. I., § 20; Art. III., § 6.

Act construed: Acts 1885 (extra session), Ch. 15.

(See 16 Lea, 136.)

2. CRIMINAL LAW. *Convict's term of imprisonment. Illegal release on habeas corpus.*

Where a convict obtains his release before expiration of his term, by an erroneous judgment on writ of *habeas corpus*, which is subsequently reversed, he is not entitled to credit on his term of imprisonment for the period of his illegal release.

(See Code, § 5576 (M. & V.); § 4781 (T. & S.).)

3. SAME. *Same. "Good time account." Failure to keep. Parol evidence.*

The record of the conduct of prisoners—termed the "good time account"—if omitted by the Superintendent of the Penitentiary, cannot be *supplied* by parol evidence; but if properly kept it may be *sustained* and *corroborated* by parol evidence, and, *on behalf of the convicts*, *contradicted* if untrue.

Acts construed: Acts 1869-70, Ch. 59, § 7 (Code, § 5559a, subsec. 7 (T. & S.)); Acts 1883, Ch. 171, § 14 (Code, § 6338 (M. & V.)).

4. SAME. *Same. Same. Presumption when no record is kept.*

Where no "good time account" is kept by the Superintendent, it is *conclusively* presumed that the prisoner's conduct was unexceptionable, and he is entitled to full benefit of "good time" credits; so where it is kept he is entitled to full credits for "good time" from date of last entry showing misconduct.

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5. JUDGMENT. *Collateral attack. Notice. Presumption.*

On collateral attack of a judgment of this Court it will be presumed that notice of *certiorari*, if necessary, was properly given, unless the contrary affirmatively appears in the record.

6. HABEAS CORPUS. *Appeal. Appearance bond.*

A bond given by a convict released on *habeas corpus*, for his appearance before this Court upon appeal by the opposite party, is valid and enforceable.

(See Acts 1887, Ch. 157.)

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FROM HAMILTON.

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Appeal in error from Circuit Court of Hamilton County. D. C. TREWHITT, J.

H. B. CASE for Johnson.

VERTREES & VERTREES, W. D. SPEARS, and Attorney-General PICKLE for McClellan.

SNODGRASS, J. The relator, Johnson, was a convict in the penitentiary, and sued out before Judge Trehitt a writ of *habeas corpus*, to be released while in service at the branch prison at Inman. On the hearing he was discharged, and the defendant, who was the Assistant Warden, having Johnson in immediate charge, representing the State, appealed.

The facts necessary to be stated for the determination of the questions, the relator makes upon the legality of his imprisonment, are as follows: Johnson was convicted of robbery and sentenced

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to imprisonment for twenty-one years by the Criminal Court of Shelby county, his term commencing on June 24, 1875. On December 29th following he escaped, but was captured and returned to prison May 14, 1876. January 13, 1883, his sentence was commuted by Governor Hawkins to sixteen years. About three years after this he sued out a writ of *habeas corpus* before Judge Frank T. Reid, of the Circuit Court of Davidson county, on the ground that his time had expired if he was properly credited with the "good time" allowed by statute, and obtained his release, being discharged February 23, 1886.

This action of Judge Reid was reversed by the Supreme Court where the case was carried by *certiorari*, and properly determined against the relator, and on April 31, 1882, he was recaptured and returned to prison. Thereupon he brought this action September 20, 1887.

In his petition he sets up, that allowing the good time which statutes previous to 1885 gave (which was one month for the first year, two months for the second year, three months for the third year, and three months for each subsequent year, to the 10th inclusive, and four months for each remaining year of the time of imprisonment), he was entitled to an allowance of fifty-one months, which left eleven years and nine months of the sixteen years he had to serve, and that about twelve years and three months had elapsed, and he was entitled to his liberty.

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The act of 1885 (passed at the extra session, June 12), Acts Ex. Sess., p. 87, is also referred to, and it is insisted that the relator was and is entitled to the benefit of that act, but such cannot be its effect, though it purports to be for the benefit of those then as well as thereafter confined in the penitentiary, because to the extent of provision for those then confined, it is an attempted exercise of the pardoning power which is vested alone in the Governor under the Constitution, and is void. In the time which has "elapsed" he includes that during which he was out of prison after his discharge, insisting first, that the subsequent reversal by the Supreme Court was void, because done in his absence and without notice; and second, that if the reversal was valid, yet he was nevertheless legally released in the interim, and his time should be counted as a part of the period of his term.

There is nothing in either of these positions. If notice was necessary of a *certiorari* in a case of this kind, which we by no means intend to decide, it would be presumed on this collateral attack of the record of this Court unless it therein affirmatively appeared that notice had not been given. The reversal determined the illegality of the discharge, and the time elapsing until re-imprisonment cannot be counted as time in prison. The imprisonment contemplated by the statute is confinement in fact, and not in legal or other fiction.



The only other question on the merits of this controversy proper to be determined is on the statute of "good time."

The Act of 1869-70, T. & S. Code, Section 5559a, Subsection 7, and the Act of 1883, M. & V. Code, Section 6338, which are identical, provides that the Superintendent of the Penitentiary shall keep a correct register of the conduct of each convict, to be termed the "good time account," in which he shall faithfully record the exact conduct of each convict, and each convict who shall demean himself uprightly shall have deducted from the time for which he may have been sentenced the time stated in a preceding part of this opinion: "The reduction of time herein provided for is upon the consideration of continued good conduct."

The last Act referred to provides that "such record shall be evidence for or against the convict in any of the courts of this State."

Such a record is produced in this case, or rather a very imperfect one, which must be treated for the purpose of determining the question as the "record" on that subject. It contains the name, age, color, and description of the prisoner, with other things not essential to be stated here, and following these under the heading of "remarks" in respect to the prisoner, adds, "escaped from prison December 29, 1875, by means of a driver, George Ament, concealing him in a furniture wagon. Recaptured May 14, 1876. Attempted to escape through roof of prison August 19, 1872. Sentence

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commuted to sixteen years. Good time to be allowed by Warden Waters. January 13, 1883."

This is all that appears. If we could look to the evidence, in the absence of any further record on that subject, it would appear that the prisoner's conduct has not been such as to entitle him to all, if any, of the good time since the date of his last recorded effort to escape, but we hold that while such evidence might be heard to corroborate or sustain a record showing his conduct, or while it might be heard, if offered by the prisoner to contradict such recitations, it cannot be heard to supply one. It is the duty of the Superintendent to keep, or have kept, under his vigilant personal supervision, the record directed to be kept by the statute, and if he fails to keep it the prisoner's right to good time shall not be left to the uncertainty of treacherous memories and oral testimony. In the absence of the record to the contrary, it will be conclusively presumed that he is entitled to the good time. The record, when properly kept, will be evidence against him, but subject to be contradicted if not in accordance with the facts.

This is the construction which common humanity dictates as embodying the intent of the Legislature, which was to provide for the keeping of an accurate account of the conduct of the State's prisoners by its own officers. It was intended that they should have the benefit of the time, and provision was made to ascertain accurately, at any time, how much should be given. If the State, through its

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officers, neglects to keep the account required, in favor of liberty it will be presumed that the record was good. The convict himself is helpless. He can have no record kept, and when he makes a good one must trust to the vigilance and integrity of those who have him in charge to enter it in the "account." If they can neglect that, and he must be left to the necessity of supplying it by evidence, it is easy to see to what injustice and trouble this would lead. Such a thing was never contemplated by the Legislature, and to give the act that construction would be to render it practically inoperative. It is, of course, quite easy to keep the record required. If not kept the omission will be treated as a waiver of any claim which the State would have to insist on an abatement of good time because of misconduct.

The last entry of misconduct on the part of the prisoner is of August 19, 1877. Prior to this date the record shows sufficient misconduct to justify the denial of any "good time." From this date he must be allowed "good time" in accordance with the Act of 1869-70.

It amounts to two years eight months and twenty-three days. This deduction from the sixteen years leaves two years ten months and fifteen days which he has to serve, and for this time he will be re-committed to the penitentiary.

The only remaining question in the case is on the appeal bond. At the last term the relator failed to appear, and judgment *nisi* was taken

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against him and his sureties on his bond given for appearance here when the case was appealed.

Two defenses are interposed to the demand for final judgment on the *scire facias* made by the Attorney-General. The first is, that he was sick, and therefore could not appear; the second, that no appeal could have been legally granted at the time, and therefore the bond is void. There is nothing in either defense, and judgment final will be entered.

The judgment of the Circuit Judge discharging defendant is reversed, relator remanded to custody, and cost adjudged against him.

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Allison v. Coal Company.

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ALLISON v. COAL COMPANY.

(*Knoxville*. October 3, 1888.)

1. CORPORATIONS. *Director's individual liability for debts of company.*

Where the charter of a corporation provides that: "If the indebtedness of said company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for said excess," in such case, the directors are individually liable for such specific debts only as were contracted with their assent in excess of the paid-up capital and remain unpaid after the corporate assets are exhausted.

Acts construed: Acts 1875, Ch. 142, § 11 (Code, § 1858 (M. & V.); § 1461 (T. & S.).

Case cited and approved: 93 U. S., 231.

2. SAME. *Same. Sufficiency of evidence.*

The evidence in this case, set out in the opinion, is held sufficient to charge the directors individually with debts of the corporation.

3. WITNESS. *Impeachment. Contradictory statements.*

In order to impeach a witness by his former inconsistent statements, he must be asked about them. Merely filing his former deposition containing them is not sufficient.

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FROM KNOX.

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Appeal from Chancery Court of Knox County.  
H. R. GIBSON, Ch.

LUCKY & YOE for Allison.

JAS. COMFORT, WEBB & McCLUNG, and TAYLOR &  
HOOD for Defendants.

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LURTON, J. This is a bill filed by creditors of the defendant corporation: first, to have the corporation wound up as an insolvent corporation, and its assets equally distributed among all its creditors; second, to hold the directors, who are made defendants, individually liable for all debts created in excess of the capital stock paid in. The first relief sought has been obtained under the decree of the Chancellor, and no error is assigned thereto.

The corporation is a coal mining company, and was organized in June, 1884, under Section 11 of the general incorporation Act of 1875, with a capital of only \$2,100, all of which was paid in. The company, at the time of its organization, by the assent of all the directors, assumed the indebtedness of a partnership which had existed between four of the five corporators. The indebtedness thus assumed exceeded the capital stock by \$3,103.18. The question as now presented upon this transcript involves only the responsibility of defendants John Chumbley and ——— Donaldson, both of whom were directors from the time of the organization of the corporation until December 5, 1884, when they sold out their stock and resigned from the board. At the time of their resignation the debts, including debts due to two of the directors, Coffin and Brooks, exceeded the capital stock some \$20,000. The debts now due and unpaid, including the claims of Coffin and Brooks, exceed somewhat this sum, but the larger part is due to the defendants, Coffin and Brooks, and no question is before us

concerning this. The unpaid debts pressing for a decree against the directors individually may be divided into two classes: first, those created before the resignation of Chumbley and Donaldson; second, those created after such resignation. The first class consists entirely of debts for machinery used in the mines, and as to these the defense of both Chumbley and Donaldson is, that they did not assent to their creation.

The debts assumed at time of organization and in excess of capital have all been paid. But the complainant contends that the liability which attached to the directors individually by their assent to the creation of an indebtedness in excess of capital stock is not discharged by such payment. That creditors whose debts were subsequently created have a right to look to the liability incurred by the first breach of trust, and that the liability thus created constitutes a fund for the benefit of *all* creditors whose debts were in excess of capital stock.

This contention involves a construction of the clause in defendant's charter which, in certain cases, imposes an individual liability upon the directors. This clause is as follows: "If the indebtedness of said company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for said excess." Acts of 1875, page 248; M. & V. Code, Sec. 1858.

We think that the purpose of the Legislature, as manifested in this provision of the act authorizing

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the incorporation of mining and manufacturing companies, was to prevent the creation of debts in excess of capital stock by declaring such management to be a breach of trust. Individual liability is assumed by all directors assenting to such breach and in favor of all creditors who shall suffer thereby. The primary liability remains upon the corporation, and only in the event of the failure and inability of the corporation to pay does a right of action arise in favor of the creditor, whose debt was made through the breach of trust.

We do not think that it was the legislative purpose to make the assenting directors individually liable to any but a creditor whose debt was made with the assent of such director in excess of capital stock. If the debt of such a creditor is subsequently paid he has not suffered by such breach, and no subsequent creditor can enforce in his own favor a liability discharged by such payment. In other words, the liability of the director depends upon three conditions: first, assent by him to the creation of the debt upon which he is sued; second, that the debt has not been paid; third, that the corporation is insolvent. Unless the very debt upon which it is sought to hold the director to individual liability was created by the assent of the director, it is not the case provided for by the charter. This clause in our general incorporation act is essentially identical with the act of Congress of May 5, 1870, regulating the creation of corporations within the District of Columbia. This act



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has been construed by the Supreme Court of the United States, who say: "We are of opinion that the fair and reasonable construction of the act is: That the trustees who assent to an increasing of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that Congress intended that, so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by their breach of trust; that this liability constitutes a fund for the benefit of all the creditors who are entitled to shares in it in proportion to the amount of their debts, so far as may be necessary to pay those debts." *Horner v. Henning*, 93 U. S., 231.

It is no answer to say that the old debt may have been paid off by the creation of a new one. If this should be so, then the directors who assented to the new debt, if beyond the capital stock, are liable individually to the creditor whose money paid off the old debt, and his remedy is against them on this latter assent and not upon their former breach of trust. This provision is a sound and wise one. The director who consents that his corporation may involve itself in debt beyond its capital stock, does it with the knowledge that he is committing a breach of trust, and that individual responsibility will attach in favor of such debts as were made in excess of capital in the event of corporate insolvency. This liability cannot but result in more cautious management of

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corporate affairs, and this is the extent of the liability, which we think, by a fair and reasonable construction, is imposed by the charter.

This brings us to the question as to whether the defendants, Chumbley and Donaldson, assented to the creation of any of the debts yet unpaid. The only debts in controversy, to the creation of which it is contended they assented, were made under and by virtue of the action of the board of directors taken upon the 8th of July, 1884, while both were in the board and both present. Chumbley was then the president of the corporation and presided at that meeting.

The action of the directors, as shown by the minutes as taken down by Mr. Coffin, one of the directors and secretary and treasurer of the corporation, is in the following words: "Upon motion of Mr. Brooks, H. Coffin was authorized to proceed North and buy at least three Lechnor mining machines and an air compressor of sufficient power to run same, and all necessary piping, machinery, etc., and that he be authorized to use the company's name in making such purchases, provided said H. Coffin and John M. Brooks hold the company harmless."

Several of the debts now filed were created in the purchase, by Coffin, of machinery of the kind described. If this resolution contains the action of the board, and same was assented to by Chumbley and Donaldson, then it is clear that the machinery was rightfully bought in the name of the com-

pany, and that the debts thus created, being in excess of the capital stock, impose individual liability upon them.

Both Chumbley and Donaldson earnestly insist that they never did assent to the purchase of this machinery in the name of the company; that Coffin and Brooks agreed to buy it in their own name and upon their own responsibility, and that it was agreed that in the event the machines proved a success the company were to allow them a royalty equal to the saving in labor. This contention is clearly in conflict with the resolution as found on the minute book of the board. Both Chumbley and Donaldson agree in stating that the resolution, as spread on the minutes, is not the action of the directors, and that neither of them ever assented to the purchase of the machinery by the corporation or in its name. While Donaldson fully sustains Chumbley in his account of the matter, yet his evidence is weakened by the fact that he is shown to have admitted to the witness, Perkins, before the institution of this suit, that they had made a mistake by giving their "consent to that," having reference to the purchase of this machinery. On the other side, Coffin testifies to the correctness of the minutes and to the assent of both Chumbley and Donaldson to the purchase on the terms shown by the resolution. He says that Chumbley had always opposed the purchase of the machinery by the company, but when he and Brooks agreed to hold the company harmless by

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Allison v. Coal Company.

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furnishing the company the money to meet the bills for such machinery, that he at once assented. He says that "holding the company harmless" meant only that they were to protect the credit of the company.

The deposition of Brooks, taken in this case, substantially sustains Coffin. This witness was examined in another case heard with this, and his deposition in this other case is relied upon as contradicting his statement that Chumbley finally assented to the purchase of the machinery in the company's name. We have carefully compared his two depositions, and are of opinion that there is no conflict. Besides, he was never given an opportunity to explain the apparent conflict, and the agreement that depositions taken in one case may be read in the other will not obviate the familiar rule of evidence that a witness may not be attacked by proof of contradictory statements without he is given an opportunity to explain by calling his attention to the matter relied upon to contradict him.

In this almost balanced state of the evidence, we think the scale is turned in favor of the complainants by two considerations: first, the machinery came marked to the company, and this fact was known to both Chumbley and Donaldson, and yet they made no inquiry or complaint; indeed, in August, 1885, Chumbley attached this very machinery as the property of the corporation and caused it to be sold as such; second, the minute book of the corporation must be treated as evidence in the

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nature of an admission and as such *prima facie* evidence of the action of the board. This minute being made shortly after the transaction, and having, at all times, been accessible to all the directors, and especially to Mr. Chumbley, the president, is *prima facie* evidence against the directors as to their official action. There was no motive for its falsification by the secretary.

These considerations lead us to the conclusion that both Chumbley and Donaldson did assent to the purchase of the machinery in the name of the company, and that as the debts of the company already exceeded the capital stock paid in, that they, together with Coffin and Brooks, are individually liable to the creditors who hold unpaid claims for machinery purchased under the resolution of July 8, 1884. The decree of the Chancellor holding otherwise will be reversed, and there will be a decree here for such debts with interest less any *pro rata* which the assets of the company may have paid.

The royalty which accrued to the owners of the mine operated by the defendant corporation while in the hands of the receiver was a first charge on the funds in the hands of the receiver, being a receiver's debt.

There was no error in the decree of the Chancellor so holding.

The costs of this appeal will be paid by defendants Chumbley and Donaldson.

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Jackson v. Meek.

JACKSON v. MEEK.

(Knoxville. October 3, 1888.)

1. CORPORATIONS. *Stockholders' liability for wages of employes. Estoppel.*  
An employe is not estopped to proceed against stockholders of an insolvent corporation for his wages—where the charter provides for their individual liability—by taking note and obtaining judgment against the corporation for such wages, and by receiving *pro rata* on his claim out of the corporate assets. The individual liability of stockholders was designed merely to supply any deficiency of the corporate assets.

Act construed: Acts 1875, Ch. 142, § 21 (Code, § 1889 (M. & V.).

2. SAME. *Same. Effect of transfer of stock.*

Stockholders are not relieved, by transfer of their stock, from their individual liability to employes of the corporation for wages previously earned.

FROM KNOX.

Appeal from Circuit Court of Knox County.  
S. T. LOGAN, J.

COOPER & FRAME for Jackson.

L. A. GRATZ for Meek.

B. J. TARVER,\* Sp. J. The facts of this contention, necessary to be stated, are as follows:

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\* Appointed by the Governor to serve during the temporary absence of Chief Justice Turney.

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The Chronicle Company was regularly incorporated a body politic and corporate in January, 1883, under the Act of the Legislature, entitled "An Act to provide for the organization of corporations, approved March 23, 1875, and section 21 of said Act. The defendant Meek was one of its charter members, and continued a stockholder therein down to November, 1885, when he disposed of his stock. Plaintiff Jackson also owned some stock in the Chronicle Company, but disposed of it before defendant Meek parted with his stock. Jackson was in the service of the company from February, 1885, to the following June, at a salary of \$12 per week. In December, 1885, Jackson had settlement of his wage account with the company, when it was found that there was due him thereon \$199.17; he receipted the pay-roll of the company but received no money, and took the company's note for the amount due him for wages. While in the company's service Jackson loaned it \$350, and took its note therefor.

In May, 1886, Johnson took a Justice of the Peace's judgement for the aggregate of his two notes against the company, and afterward, in same month, on his own petition, Jackson was made a party to proceeding in the Chancery Court to wind up the Chronicle Company as an insolvent corporation, and received his *pro rata* upon said judgment, which was about 20 per cent.

April 11, 1888, Jackson took a Justice of the Peace's judgment against defendant Meek for

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\$112.17, it being the balance of his claim for wages, after being credited with its *pro rata* and \$50 paid by a shareholder of said company.

Meek appealed from this judgment to the Circuit Court, where there was a trial before the Judge without the intervention of a jury, and judgment in his favor, the trial Court holding that Jackson was estopped by taking the company's note for his wages, and his subsequent efforts to collect from the corporate assets.

Is there reversible error in the ruling of the trial Court?

The general rule of the common law holds the shareholder of a corporation liable for the debts of the association only so far as he may have agreed to contribute to the capital stock of the company; his liability is in his corporate capacity, and is deemed the primary source for the payment of the company's debts. But our Legislature has superadded to this common law liability, in corporate capacity, an individual liability upon the shareholders of all corporations incorporated under 21st section of the Act of 1875, in favor of journeymen, servants, and employe's wages, that may be earned in the company's service; this liability is regarded as a secondary source for the payment of the debts provided for. Each wage earner of the Chronicle Company had two sources for the payment of his debt, first, the corporate assets, and second, the individual stockholders.



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The current of adjudged cases in other States seem to hold that each stockholder upon becoming such in a company with this individual liability provision, does so with the understanding that he will not be held to pay individually until the corporate assets have been found to be insufficient. We assent to the soundness of this proposition. Morawetz on P. Cor., sec. 869 *et seq.*; Thompson on Liability of Stockholders, sec. 334.

It follows, therefore, that the plaintiff, Jackson, in seeking to collect his debt for wages, in the first instance, from the assets of the Chronicle Company, was in the line of duty, and certainly not thereby estopping himself from afterward availing himself of the benefits secured him by the individual liability clause of the charter, and that the trial Judge is in error, and his judgment should be reversed.

But it is insisted that the defendant Meek, having parted with his stock in November, 1885, some two years before the suit against him before the Justice was commenced, his individual liability for the plaintiff's debt for wages ceased to rest on him, and passed over to his transferee, to whom the plaintiff must now look. Is this correct? When the wage earners who were in the employ of the Chronicle Company, and contracted with it, contracted upon the faith of this individual liability clause, the offer of the shareholder contained in the clause in question being accepted by the

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Jackson v. Meek.

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“servants and employes” of the company, ripens into a binding contract. This binding contract was upon these shareholders, who were such at the time the service was rendered.

This individual liability, when ripened into a binding contract, is beyond the control of the company or its officers; none but those for whose benefit the provision was made can release the contract. To hold differently would practically destroy this provision for the wage earner's benefit. When the shareholder sees the approaching insolvency of the corporation, he has only to make transfer of his stock to a straw man, fold his arms and let the crash come. We hold that the Legislature did not intend to place the life of this security in the hands of the shareholder, but designed it to be a security, the burden of which cannot be shifted by the shareholder to another, to the prejudice of the wage earner, without his concurrence.

If material, it is not shown to whom the defendant Meek's stock was transferred, whether to one able to discharge the liability for wages, nor whether transferred in good faith.

Under the facts of the case, the defendant Meek has not relieved himself of liability, under the clause, to the plaintiff.

The judgment of the Court below is reversed, and the plaintiff will have judgment here against the defendant Meek for the amount of the Justice's judgment, with interest, and for all the cost of the cause.

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Wright v. Thornton.

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WRIGHT v. THORNTON.

(Knoxville. October 3, 1888.)

1. ADMINISTRATION. *Sale of lands to pay debts. Administrator a necessary party. Resignation.*

A decree for sale of a decedent's lands to pay debts, rendered on application of creditors, is void, where the administrator, by reason of his previous resignation, is not before the Court, in his representative capacity, at time of its rendition.

2. SAME. *Case in judgment.*

Under the facts of this record it is held that no administrator was before the Court at date of decree of sale.

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FROM HAMILTON.

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Appeal from the Chancery Court of Hamilton County. D. C. TREWHITT, J., sitting by interchange.

ELDER & WHITE, P. A. BRAUNER, J. A. CALDWELL, SHEPHERD & FRAZIER for Creditors.

TOM. FORT for Heirs.

SNODGRASS, J. The original bill by one of the creditors of the estate of D. D. Jones was filed against defendant Thornton as administrator with the will annexed, and Latimer I. Jones, the only child and devisee of D. D. Jones, January 21, 1887, to sell land to pay debts.

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Wright v. Thornton.

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Petition of D. P. Henderson & Co. *et al.*, to become parties complainant, was filed April 6, 1887.

Judgment pro confesso was taken against Thornton April 26, 1887.

The prayer of the Henderson & Co. petition was granted and they were made parties May 4, 1887, and it was ordered that the bill be taken and stand as a general creditor's bill. Other creditors were given leave to become parties, and the Clerk and Master was directed to make publication requiring creditors to file their claims.

In the meanwhile the insolvency of the estate had been suggested by a creditor of the estate (March 21, 1887) in the County Court, and March 22, 1887, Thornton had petitioned the County Court to be allowed to resign.

His resignation was accepted, and he was discharged from the trust by the County Court on the 18th day of May, 1887.

On the 2d of June following, W. B. Seymour, D. W. Hughes *et al.* filed a bill alleging the suggestion of insolvency in the County Court and the resignation averring it to be invalid.

They sought to transfer the administration to the Chancery Court and to have their bill treated as a general creditors' bill for that purpose, or as petition in the cause of *Wright v. Thornton*.

Other petitions of creditors were filed in the cause, and September 28, 1887, the Chancellor pronounced a decree declaring that defendant Thornton, as administrator, having been

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Wright v. Thornton.

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served with process before his attempted resignation in the County Court, the resignation did not relieve him of his trust, and copy of decree was directed to be served upon him.

A reference for an account of the estate was at the same time made. Proof was taken and report filed.

The administrator does not appear to have excepted or made any defense, but the guardian *ad litem* of the minor defendant, the devisee of testator, D. D. Jones, excepted to depositions and report.

These appear to have been in part sustained and in part overruled, and another reference was ordered.

Another report was made. This was incidental to the first.

It was confirmed without exception and thereupon a final decree was pronounced in favor of complainants and directing sale of the real estate.

The minor by guardian *ad litem* appealed and assigns error.

The principal error assigned is that there was no administrator of D. D. Jones, the testator before the Court, as a proper defendant to all the bills and petitions when the final decree was rendered. This assignment is good and is sustained. Whatever might have been the effect of the resignation of Thornton in the suit of Wright alone against him, it is not material to discuss. There was in that bill no effort made to transfer the

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administration as such to the Chancery Court, nor was the bill such an one as could have effected that result. The County Court had not lost jurisdiction of the administration by reason of the pending of that suit. No steps had been taken in it which deprived the County Court of that general jurisdiction before it accepted the resignation. On suggestion of insolvency a bill could have been filed, or the one pending so amended as to seek the transfer, but no such thing was done until the Seymour petition, which was filed *after* the resignation had been accepted.

It did not make allegations which would have authorized the appointment of an administrator by the Chancery Court, but might have done so, of course, if no one could be procured to administer in the County Court. Or, if such reason did not exist, complainants could have procured an administrator to be appointed in the County Court, and made him a defendant. But they could not proceed to a settlement of this estate and sale of the property without one, and there has been no administrator of the estate since the resignation of Thornton.

The decree of September 28, 1887, and subsequent reports and decrees were, therefore, void, and must be set aside, and the case remanded for further proceedings. The costs of this Court will be paid by complainants.

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Prater v. Prater.

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3pi 78
4pi 646

PRATER v. PRATER.

(Knoxville. October 15, 1888.)

1. HOMESTEAD. *Widow's right of. Non-residence. Elopement.*

A woman who has, without cause, deserted her husband, and eloped with another man, and taken up permanent residence with him in another State, and there continued to live in adultery with him, until her husband's death, forfeits her right, as widow, to homestead in lands owned by the husband at his death.

Constitution construed: Art. XI., § 11.

Code construed: §§ 2935, 2943 (M. & V.); §§ 2114a, 2119a (T. & S.).

Cases cited and approved: *Emmett v. Emmett*, 14 Lea, 370; *Hawkins v. Pearce*, 11 Hum., 45; *Lesenbee v. Holt*, 1 Sneed, 50.

2. SAME. *Same. Wife's domicile.*

In such case the wife has acquired a domicile in the State of her actual residence, independent of her husband's domicile.

Cases cited and approved: 36 Tex., 661; 9 Tex., 643.

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FROM KNOX.

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Appeal in error from Circuit Court of Knox County. S. T. LOGAN, J.

TAYLOR & HOOD for Complainant.

WAT. M. COCKE for Defendant.

CALDWELL, J. This is a bill for dower and homestead.

The Chancellor refused the claim of dower, but allowed that of homestead.

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Prater v. Prater.

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Complainant acquiesced in the decree; but the defendant has, by writ of error, brought to this Court for revision so much of it as adjudged complainant entitled to homestead.

It is alleged in the bill and admitted in the answer that complainant Margaret Prater and Ambrose Prater intermarried "many years ago" in this State, and lived here together, as man and wife for "several years;" that, thereafter, they were separated for a long period of time, and never lived together again; that at the time of his death, in January, 1887, and for about five months previous thereto, he was cohabiting with the defendant, Laura, as his wife; that he died without issue, and testate, having bequeathed and devised the whole of his very small estate to the defendant, whom he, in his will, called his "beloved wife;" that the defendant has, since his death, continued to reside upon and claim as devisee the only real estate he left, being a house and lot in Knoxville, occupied by him and her as their home at the time of his death; and finally, that complainant, insisting upon her rights as the lawful widow, had formally dissented from the will before she filed this bill.

It is further alleged in the bill that Ambrose Prater, while living with complainant as his wife, became enamored of another woman (not the defendant), cohabited with and had several children by her; that this caused the separation between him and complainant, and that thereafter he pre-



tended to marry the defendant, and did live and cohabit with her as his wife until his death, though they both knew that complainant was still "alive and the lawful wife of Ambrose Prater."

The defendant, in her answer, says that she was married to the deceased in August, 1886; that he always represented to her that he had been legally divorced from the complainant, and she positively denies that she knew that complainant still claimed to be the lawful wife of Ambrose Prater.

She says, further, that she has no knowledge of the alleged improper relations of Ambrose Prater with the woman referred to in the bill; but she denies that such was the cause of the separation. She says, on the contrary, that complainant herself became grossly unfaithful, and committed "repeated acts of adultery" with John Huchison and other men; that she abandoned Ambrose Prater and took up her abode with said Huchison and lived with him in the city of Knoxville for a time, after which, in the year 1881, she eloped with said Huchison and went with him to Ashville, North Carolina, where they continued to live and cohabit as man and wife, and where they still so live and cohabit, "unless they have recently removed" to some other place; and that the deceased acquired the house and lot, in which complainant seeks to set up rights of homestead and dower, long after the separation from complainant, and when he believed that he had been lawfully divorced from her and legally married to the defendant.

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The answer concludes as follows:

"Now, therefore, the complainant, at the time of the death of the deceased, not being a resident of this State, but a citizen of the State of North Carolina; and having more than fifteen years before left the domicile and abandoned the home of the deceased, of her own cause, and without any fault of the deceased; and having eloped and lived in adultery with said John Huchison for these ten years, she is, in consequence thereof, forever debarred from dower and homestead in the real estate of the deceased."

Complainant set the cause for hearing upon bill and answer; and thereby, under a familiar rule of Chancery practice, admitted the truth of the answer.

Upon the record thus made up the Chancellor heard the cause, with the result already stated.

There being no appeal from the decree as to dower, *the question for our decision is, whether or not the complainant is entitled to homestead under the facts of this case.*

We think she is not, for more reasons than one:

*First*, The complainant is a non-resident of this State, and being such is not entitled to the benefit of our exemption laws.

It is true that she states in the caption of her bill that she is a resident of Blount County, Tennessee; but that statement is not established by proof, nor admitted in the answer.

On the other hand, it is distinctly stated in the

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answer that complainant was a non-resident of this State and a citizen of North Carolina when Ambrose Prater died, which was less than twelve months before the filing of the bill; and, again, that she and Huchison resided in Ashville, in the latter State, from 1881, and were still residing there, when the answer was filed in February, 1888, "unless they have recently removed" to some other place.

These statements, which are taken as admitted to be true, establish the non-residence of complainant. They show that her residence was in another State when Ambrose Prater died, that it had been there for many years prior to his death, and that it was still there when the answer was filed, unless recently changed.

The place of residence being once established is presumed to continue until a change is shown to have been made. In this case the burden of showing change is upon the complainant, yet she has offered no proof whatever upon the subject.

The allegation of residence in Tennessee, made in the caption of the bill, is not *evidence* of a change of residence from North Carolina to this State; yet that is all that appears in this record to overcome the facts and presumption just mentioned, and to sustain the argument of counsel for complainant that she is in fact a citizen of this State.

It has long and uniformly been held by this Court that our exemption laws were enacted for

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the protection of citizens of this State only, and that non-residents cannot avail themselves of their benefit.

It was so held, *as to personalty*, in *Hawkins v. Pearce*, 11 Hum., 45, and in *Lisenbee v. Holt*, 1 Sneed, 50; and, *as to claim of homestead*, in *Emmett v. Emmett*, 14 Lea, 370.

The Emmett case is particularly in point, for in that case, as in this, the claimant was the non-resident widow of a man who was a citizen of this State, and who died here, in the possession and occupancy of the property, in which the claim of homestead was asserted. In that case the claim was refused by this Court alone upon the ground that the claimant was a non-resident.

In its moral aspect that was a much stronger case for the allowance of homestead than this is. There the husband had abandoned the wife, while here the wife abandoned the husband.

The fact that Ambrose Prater was a citizen of this State and entitled to homestead at the time of his death does not help the complainant's case, or make her any the less a non-resident.

We concede that, as a general rule, the domicile of the husband is, in contemplation of law, the domicile of the wife; but, of necessity, there are many exceptions to that rule. This case furnishes a striking exception, and forcibly illustrates the injustice that would flow from a universal application of the rule.

No effect was given to this rule in the Emmett case, just mentioned. In fact, it was not referred

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to at all in that case, but the real residence of the wife was treated as controlling. So we treat it in this case.

With respect to the unity of domicile as bearing upon the homestead right, Judge Thompson says:

“But, as the domicile of the husband draws with it the domicile of the wife, the fact that a wife remains out of the State with the consent and approval of her husband has been held not to preclude her, after his death, from asserting a homestead right in his estate as against his creditors. But it is otherwise if the absence was voluntary on the part of the wife, amounting to a wrongful abandonment of the husband.”

Thomp. on H. and E., Sec. 91, citing *Lacey v. Clements*, 36 Texas, 661, and *Earl v. Earl*, 9 Texas, 643.

It has also been held that a wife is not entitled to homestead in the lands of her husband, acquired in another State by him after deserting her and their children, she never having resided in the latter State. *Stanton v. Hitchcock* (Mich.), 31 N. W. R., 395.

*Secondly*, Taking the answer of defendant to be a correct history of the life and conduct of complainant since her marriage with Ambrose Prater, we have no hesitation in holding that she, by that life and conduct, abandoned and forfeited all right she may ever have had to homestead in his property. She voluntarily and permanently deserted

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husband and home, eloped with another man and lived with him, out of this State, in continuous lewd intercourse for a long period of years, even up to the very time her deserted husband died.

While he lived there was no condonation of her offense—no reconciliation between them. None was sought by her, none offered by him.

For her conduct this record presents not the slightest excuse or justification.

It is true she alleges improper relations on his part with another woman prior to the separation between him and complainant, but there is no effort to prove the truth of the allegation, nor is it admitted in the answer, so as to dispense with the necessity of proof.

In the absence of evidence, in some form, impeaching his treatment of complainant, it is presumed that he acted toward her as the law required him to do, and that her confessed desertion of him and his home was willful and without provocation.

His marriage to the defendant a few months before his death, and long years after the complainant abandoned him, does not reflect upon his conduct toward her before she left him, for the answer asserts that the marriage between him and the defendant was in regular form, and by them believed to be lawful, on the assumption that complainant had obtained a divorce from him.

True, this record furnishes no proof of a divorce, and the complainant must, therefore, for the

purposes of this suit, be regarded, in a technical sense, as the wife of the deceased at the time of his death.

But that cannot change the result. All except the mere formal relation of marriage had long since ceased to exist between them. She looked not to him for the protection and support due from a husband to his wife; nor did she perform for him, or acknowledge as due to him, any of those duties and obligations which a wife owes to her husband.

Though complainant is technically the widow of the deceased, she does not bear to him, to his family, or his estate, that relation which alone would justify her claim to homestead.

The homestead exemption is intended solely for the benefit of the *family*, and none are authorized in law to participate in its advantages except those who come within the meaning of that term. Ordinarily the wife is entitled to share in the homestead, because she is ordinarily a member of the family; but if she voluntarily withdraw from the family circle without cause, and of her free choice live elsewhere, she then and thereby excludes herself from the enjoyment of the homestead with the family.

So the "widow," to whom the right of homestead inures at the death of the husband, must have been a member of his family in a legal sense when he died; otherwise she cannot successfully assert a claim to homestead in his estate after his

death. This does not imply that she must in fact and in all instances have been residing with her husband upon the homestead at the time of his death; it is sufficient that she was, at that time, *in law entitled to such residence with him, or with the family.*

But, if she has, willfully and without excuse, deserted the family and eloped and lived with an adulterer, or otherwise so demeaned herself that she may neither in morals nor in law require the husband to receive her back again, she is, in such case, not a member of his family while he lives, and does not become his "widow" in contemplation of the homestead laws when he dies.

By all rules of public policy and good morals, the complainant in this case had forever excluded herself from the society, family circle, and home of her husband in his life-time; and by the same rules she is excluded from the enjoyment of his homestead after his death.

Upon the whole case, it is true, as said in behalf of the complainant, that the right of homestead in this State is a constitutional right, and should be zealously guarded by the courts.

We have recognized this fact fully in the consideration of this case, and in the preparation of this opinion.

But it is equally true that before a person can justly assert a constitutional right he must bring himself within the operation of the constitutional provision. This the complainant, now before the



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Court, has failed to do in two particulars. She has not shown herself to be a resident of this State, nor has she shown herself to be the *widow* of the deceased, in the sense contemplated by the Constitution. She has failed to establish for herself a *status* to which the constitutional provision, in any sense, applies.

Again, a constitutional right, like a statutory or other right, may be abandoned and forfeited by the beneficiary.

It has been so held repeatedly in this State and in many of the other States of the Union, and that, too, with respect to the right of homestead itself.

The decree as to homestead is reversed and the bill dismissed.

Complainant will pay all costs.

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Galbraith v. Lunsford.

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## GALBRAITH v. LUNSFORD.

(Knoxville. October 18, 1888.)

1. MARRIED WOMEN. *Estoppel of, to assert title to realty. Fraud.*

A married woman may, by acts *in pais*, done without any intentional fraud, estop herself to assert title to her realty against persons misled to their prejudice by such acts.

Cases cited and approved: *Howell v. Hale*, 5 Lea, 405; *Cooley v. The State*, 2 Head, 606; *Pilcher v. Smith*, 2 Head, 208; *Borham v. Turbeville*, 1 Swan, 437; *Adams v. Fite*, 3 Bax., 69.

Cited and disapproved: 13 Cal., 494 (73 Am. Dec., 593.)

Cited and distinguished: *Dodd v. Benthall*, 4 Heis., 601.

2. LAND LAW. *Boundaries. Estoppel.*

A landowner is estopped to assert title to his true boundary, where he and those under whom he claims, have, for over thirty years, recognized, by mistake, another line—claimed as the true one by the adjoining owners—by making partition to it, calling for it in deeds, and pointing it out to others; *and the adjoining owners, upon the faith of such recognition, have purchased, cleared, and improved up to that line.* And it is not material that the landowners were mutually mistaken as to the true line, and could have discovered it, at any time, by survey.

Cases cited and approved: *Houston v. Matthews*, 1 Yer., 116; *Gilchrist v. McGhee*, 9 Yer., 458; *Meriwether v. Larman*, 3 Sneed, 451; *Lewellen v. Overton*, 9 Hum., 76; *Rogers v. White*, 1 Sneed, 69; *Riggs v. Parker*, Meigs, 49; *Yarborough v. Abernathy*, Meigs, 420.

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FROM KNOX.

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Appeal from Chancery Court of Knox County.  
H. R. GIBSON, CH.

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Galbraith v. Lunsford.

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LUCKY & YOE and PICKLE & TURNER for Galbraith.

J. L. ROGERS for Lunsford.

FOLKES, J. This is an ejectment bill, the disposition of which was dependent upon a question of boundary.

After answer and proof the cause was submitted to Mr. Jerome Templeton, a solicitor of this Court, as an arbitrator, who was "to hear and decide the same according to the law and the evidence." The award was to be in writing, and was to be made the decree of the Court.

The arbitrator presented his award, wherein was stated his findings of fact and of law, adjudging that the bill should be dismissed.

Complainants excepted to the award upon the ground that the arbitrator manifestly undertook, as he was required by the submission, to decide the case according to law, but that he had misconceived the law, and determined the case contrary thereto upon the facts as found by him.

The Chancellor overruled the exceptions, and entered a final decree making the award the judgment of the court.

Complainants have appealed, assigning as error the action of the court in refusing to set aside the award, and in entering decree thereon.

Under the submission the arbitrator was judge of the facts and the law, and was not required to

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give the grounds of his decision, in which event it would have been presumed that he had decided according to law. But having stated his findings of fact, it was proper for the court to determine, on the exceptions presented, whether the conclusions of law announced by the arbitrator were warranted by the facts as found, in a case where, by the terms of the submission, the award was to be in accord with the law: *Powell v. Riley*, 15 Lea, 153.

The proof is not in the record, having properly been omitted, inasmuch as no question was made, if, indeed, any could have been made, as to the correctness of the conclusions of fact reached by the arbitrator. We are, therefore, to consider only the question propounded in the exception to the award, to wit: that the deductions of law upon the facts, as found, are contrary to law.

The complainants, in support of their exceptions in the court below, now advance the following propositions in their assignments of error in this Court:

“*First*—A line which could be easily ascertained by survey, and which had been known, and was lost or overlooked by mutual mistake, was and is not a doubtful line that could be agreed upon or fixed, or become a true line, and binding by recognition, because void under the statute of frauds.

“*Second*—Recognition of a line under a mistake of fact, where it was mutual, and either could have discovered the mistake by survey or otherwise, is not binding on either party, and neither party can set up the mistake against the other by way of

estoppel or otherwise, as mistake is as much that of one as the other, and fault, if any, is equal; and besides, an admission made under mistake will be relieved against in equity, more especially when mistake is mutual.

“*Third*—Recognition of a line not the true one will not divest title to land out of a married woman, nor minor, by estoppel or otherwise, as married women cannot be divested or part with title to land in that way; but more especially when it was by mistake of fact as well upon the part of her adversary as that of her own, and when either could have easily discovered the mistake; nor is such married woman or descendants estopped to set up the truth and recover accordingly, and more especially in a court of equity.”

Robbed of their verbiage, the assignments of error are to the effect:

*First*—That the line or boundary, under the facts as found by the arbitrator—there being, as assumed by the assignments, no *bona fide* doubt as to the true line entertained by both parties—was not such a doubtful boundary as could be established by parol or acquiescence.

*Second*—That the doctrine of equitable estoppel does not apply at all to the facts as found.

*Third*—And if applicable, it cannot be effectual as against married women.

Before disposing of these propositions let us see what are the findings of the arbitrator, as shown by the award itself. We quote:

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## "AWARD.

"Without going into the details of the proof, I find as follows:

"*First*—The south boundary line of grant No. 18,417 to William Cox, issued October 3, 1833, is the line from 'F to E,' on plat exhibit A, to the deposition of F. W. Galbraith. I further find, that as an original proposition, the north boundary line of the 250-acre tract, William Cox to Jacob Pete, September 22, 1814, was the line from 'I to T' on same plat, and in 1833, when said grant was issued, the two tracts adjoined the lines here above described, being the same so far as the latter extended, and being the dividing line of the tracts. I add, that if I am mistaken as to true south boundary of said grant, the result would be the same, because the deed from George M. Combs to William Cox, February 10, 1814, covered both tracts, and both parties to this suit deraign title from William Cox, and I am convinced the north boundary line of the 250-acre tract is the line 'I to T'; that is, if not under said grant certainly under the Combs deed, so far as these parties are concerned, William Cox owned the land in controversy.

"*Second*—I find that somewhere between August 11, 1846, and March 28, 1857, that is, while Presley S. Chesher owned the 250-acre tract, or prior to August 11, 1846, said dividing line was lost, or at least its location became doubtful. As a con-

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sequence Chesher, between the point 'I' and the Newmarket road, on said plat, cleared and inclosed the land up to and along the line from 'O to P,' on said plat, being the disputed line, as defendants claim it. Chesher did this under a claim of right, which I infer from the circumstances. He thought that was his line. There is a marked line there, not as old as the line from 'F to E,' but still an old line.

"Further, B. F. McFarland and wife, Sarah M. L. McFarland, a daughter, and the vendee of William Cox, made the same mistake. They either forgot, or never knew, where the true dividing line was, and they clearly recognized the line from 'O to P' as the dividing line between them and Chesher.

"I find no evidence that Mrs. McFarland ever recognized said last named line before her marriage. The deed to her from her father, containing the boundaries of said grant, is dated April 16, 1841, and conveys to her by her maiden name. Her marriage was subsequent, but the date does not appear. On one occasion, while John E. Hopkins owned the 82-acre tract, being the northern portion of the 250 acres, that is, after November 3, 1886, and prior to 1869, when Mrs. McFarland died, she and John E. Hopkins went along the Chesher fence, along the line from 'O to P,' talking about a trade as to Mrs. McFarland's land north of said line, she then recognized said line as the dividing line between her and Hopkins. This is cited as showing the recognition of said line, as defendants

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claim it, was not by B. F. McFarland only, but also by his wife.

"This recognition extends as far back as forty years ago, or to 1848. In 1870, the heirs-at-law of Sarah M. L. McFarland, deceased, recognized the same line 'O to P' when they partitioned among themselves the lands inherited from their mother. When John Neal bought the 82-acre tract from B. F. McFarland, November 3, 1863, and when Hopkins bought the same from Neal in 1866, said line 'O to P' was the dividing line, being lived up to and recognized by McFarland and wife; and we may assume that both Hopkins and Neal bought with that understanding, well justified by the conduct of McFarland and wife.

"In 1870, the commissioners making partition did the locating of lines, but that only shows the mistake about the division line had become the understanding of the neighborhood. By accepting the partition the heirs showed themselves ignorant of any mistake, so long had it (the line) been recognized.

"In 1873 John E. Hopkins, desiring to build a new dwelling house, procured the division line to be run by J. P. Galbraith, the husband of one of the McFarland heirs, who showed him where to build. Several other of the McFarland heirs were then at home in the neighborhood, and must have known of the building of the house, which was on their land, as they claim it now, but was on Hopkins' land, and just south of the division line,



as they must have known Hopkins claimed it. To say the least of it, they were silent when they should have spoken.

"In 1877 R. M. Barton, Jr., and wife, Jennie M. Barton, the latter being one of the McFarland heirs, by deed called for the Hopkins division line from 'O to P.'

"In July, 1877, Barton and wife sold the residue of the land partitioned to the latter to William Galbraith, and some time afterward, and prior to June, 1882, when Mr. Galbraith filed his bill against John E. Hopkins, the discovery was made that the line so long recognized and lived up to on both sides as the true division line, that is the line from 'O to P' was a mistake, and that the true line ran from 'F to E,' or from '3 to J,' on said plat. The line from 'O to P' never was consistent with the second call, 'thence north ten poles to a stake,' or with the fourth call, 'thence north forty-four poles to a stake,' in the deed from McFarland to John Neal, made in 1863. Nor was the same consistent with the calls of the deed from William Cox to Jacob Pete, made September 22, 1814, nor was the same consistent with the oldest marked line on the ground. An accurate survey at any time ought to have discovered the true line. But so it was, the parties on both sides the line made a mutual mistake, without taking the trouble of a survey, on which they acted from some time prior to 1848 to some time after 1877.

"After so long a public acquiescence, and so many

public acts, some by solemn deeds of record on the part of Sarah M. L. McFarland, her husband, and her heirs, under the influence, and with the knowledge of which, strangers have bought the adjoining land and built a valuable house thereon, worth many times the value of land involved, can the McFarland heirs now be heard to complain of said mistake and be allowed to correct the same.

“Where the true locality of the line is doubtful, such acts are regarded as furnishing evidence that the line so recognized is the true line; nor are either of the parties at liberty afterward to abandon such line, although the line should afterward be ascertained at a different place. 9 Yer., 458-9, Green, J. See also 3 Sneed, 446-8.

“In the application of the principle of equitable estoppel there is no exception in the case of married women. Herman on Estoppel, 1232. See also 5 Lea, 405; Pomeroy’s Eq. Jur., §§ 814-15-17-18; 1 Head, 320; 8 Bax., 289.

“And the doctrine applies to infants having such intelligence as to enable them to comprehend the import of their conduct. 1 Swan, 438.

“If this authority is doubted still, the only infant affected is Mrs. Barton, who, with her husband, after her majority, ratified her former recognition of the line so long lived up to.

“I do not think the case of *Wm. Galbraith v. John E. Hopkins* is *res adjudicata*, because, first, complainants in this cause (except Barton’s wife) were not parties to that suit; second, the land in-

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volved here was not involved in that suit. The subject-matter was not the same.

"Being clear in my convictions above expressed, without discussing the question of the statute of limitations, I decide, having considered the case as arbitrator, according to the submission made in the case, that complainant's bill be dismissed with costs.

Signed,

JEROME TEMPLETON."

We have given the entire award, so that it may be seen what were the findings of fact and of law. The award must be taken as a whole, and not in detached sentences. It will not do to cull out words here and there, and from them argue that the parties knew where the true line was. The mutuality of the mistake, and the ease with which the parties might have discovered the same had they taken the old deeds and procured the services of a competent surveyor, does not render it any the less a mistake. The fact still remains that there was an honest ignorance of the whereabouts of the true line, and a *bona fide* recognition of the line indicated on the plat as "O to P."

If, with full knowledge of the true line, another be fixed by verbal agreement, such agreement is within the statute of frauds, and consequently void; but where there is doubt or ignorance as to the true locality of the line, a parol agreement fixing the line between adjoining owners is not within the statute, and where satisfactorily established, will be enforced by the courts, notwithstanding it

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may afterward be demonstrated that the agreed line was erroneously fixed; and such adjustment may be shown as well by circumstances and recognition as by direct evidence of a formal agreement, where parties have acted thereon. *Heirs of Houston v. Matthews*, 1 Yer., 116; *Gilchrist v. McGee*, 9 Yer., 458; *Meriwether v. Larman*, 3 Sneed, 451; *Lewellen v. Overton*, 9 Hum., 76; *Rogers v. White*, 1 Sneed, 69; *Riggs v. Parker*, Meigs Rep., 49; *Yarbrough v. Abernathy*, Meigs Rep., 420.

The cases on this subject are numerous in this State, and citations might be multiplied, but they clearly make the distinction and establish the principles as stated above. This being so, it is not difficult to apply them to the findings of fact made by the arbitrator in the case at bar.

We have admissions and declarations; we have conveyances made and partitions had, calling for the line "O to P." We have long acquiescence on the part of complainants, and those under whom they claim, coupled with the expenditure of money by defendant in building improvements upon the property in dispute largely in excess of the value of the land itself, induced not only by what had long been the understanding of the parties as to the location of the line, but by positive pointing out of the line, with knowledge that the improvements were then about to be made. And during all this time we have absolute ignorance on the part of the adjoining owners as to the true line; ignorance none the less absolute by reason of the

fact that, in the opinion of the arbitrator, it might have readily been removed by a survey; there was no survey, and the honest ignorance remained until shortly before the filing of the bill in this cause. This is not a case of silence, but of numerous affirmative acts and admissions that were calculated to, and did influence the conduct of defendants, and which acts and admissions are inconsistent with the claim of title now sought to be set up. The facts, as found, would seem to make out a case of estoppel, unless the disability of coverture prevents the application of this doctrine, as is strenuously insisted upon by the learned counsel for complainants.

Let us see how this is:

The contention is, that as a married woman cannot, in reference to her lands, bind herself by title bond, power of attorney, contract of sale, or even a deed without privy examination, and certificate of acknowledgement in a prescribed form, showing that it was done freely, voluntarily, and understandingly, it would be an anomaly in the law to hold that she might part with her title indirectly when she had no purpose to do so, and when, instead of doing so freely, voluntarily, and understandingly, she was actually in ignorance, or laboring under a mistake of fact. And cases are cited which seem to sustain the contention. It must be admitted that the cases on this subject are, to a certain extent, conflicting. But much of the difficulty and confusion is due to a failure to observe the dis-

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inction between the cases which seek by the doctrine of estoppel to *validate those contracts* of a married woman which, by law, are declared void, and the cases where, in the absence of any contract, and independent of any contract or agreement, her *conduct* has been held to prevent her from asserting what would otherwise be a right. To the former class belongs the case of *Dodd v. Benthall*, 4 Heis., 601. And the language of the judge delivering the opinion in that case, at page 607, where he says, "the complainant being both an infant and *feme covert* at the time of the execution of the deed in question, no act of affirmance or disaffirmance *in pais*, on her part during coverture, could be binding on her," etc., is correct when confined to a *contract* of a person under disability, which, by law, is void in consequence of such disability.

To the latter class, above referred to, belongs the case of *Howell v. Hale and Wife*, 5 Lea, 405. Here the *conduct* of the married woman, independent of any contract, operates to estop her in the same manner and to the same extent as if she were a *feme sole*. So in the case at bar, while there are facts and circumstances upon which a contract might be implied, that would be binding upon a person *sui juris*, yet there are also such admissions, statements, and conduct on the part of the complainants and their ancestor, as are amply sufficient to create an estoppel entirely independent of and altogether outside of any idea or claim of a contract.

Mr. Pomeroy says: "That while upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions, the tendency of modern authority, however, is strongly toward the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability;" and that the decisions to the contrary seem to be in opposition to the general current of authority. Modern English cases, as well as American, are cited to sustain the text. § 814 and notes.

The case of *Morrison v. Wilson*, 73 Am. Dec., 593 (same case, 13 Cal., 494), relied on so confidently by counsel for complainant, seems to not only deny the application of an estoppel *in pais* to a married woman, but goes so far as to hold that affirmative fraud on her part will not effect that result. It is sufficient to say of this case that it not only loses sight of the distinction referred to as to defective execution of a contract, but is directly opposed to our own adjudged cases, so far as the element of fraud is concerned.

The doctrine of estoppel has, by courts of this State, been applied to married women and infants. Thus, in *Howell v. Hale and Wife*, 5 Lea, 405, she was held estopped by matter *in pais*. She had, by her conduct, induced Thornhill to purchase the mortgage debt on her land, leading him to believe that the land should stand liable therefor; this Court held her estopped by her conduct to make defense

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to said mortgage, whether she might have done so or not as against the original mortgagee.

In *Cooley v. The State*, 2 Head, 606, we have a clear case of estoppel *in pais* applied to a married woman. She had, in a deposition, made a statement as to title to certain slaves, contrary to what she there asserted in the case before the court; this Court said "complainant would be clearly entitled, upon well established principles, to the relief sought, but for the estoppel created by her oath in the before-mentioned deposition."

To the same effect is *Pilcher v. Smith*, 2 Head, 208, where it is said "the legal disability of coverture carries with it no license or privilege to practice fraud or deception on other persons.

Estoppel *in pais* has also been applied to infants by this Court. *Barham v. Turbeville*, 1 Swan, 437; *Adams v. Fite*, 3 Bax., 69. In the latter case the court, after finding the weight of the proof in favor of the complainant having been of age at time of the execution of the deed, continuing, said, "both on the ground of long acquiescence and of the concealment of the fact that he was not of age, when complainant had good reason to know that Ewing was trading with him as *sui juris*, complainant is repelled, even if he was in fact only twenty years of age when he made the deed."

It is true that in the case of *Barham v. Turbeville* the infant was not merely silent, but actively proclaimed his father's title to the property he subsequently sued for, and the court puts the estop-



pel upon the ground of actual and purposed fraud, which was right and proper, under the facts of that case. But so far as the opinion in this case undertakes to hold that *actual* and *positive* fraud at the time of the act set up as constituting the estoppel, is essential to the application of the doctrine of estoppel, it is *obiter* and unsound, as we shall presently undertake to show.

It is also urged that actual fraud must exist before an estoppel can be maintained against a person *sui juris*, and *a fortiori* before it can be applied to a married woman, if against the latter it can be invoked at all.

It is true that there is a theory which makes the essence of equitable estoppel to consist of fraud; but this theory is not sustained by principle or authority. There are many well settled cases of estoppel familiar to courts of equity which do not rest upon fraud, and instances are admitted, even by the courts which maintain this theory, which cannot be said to involve any element of fraud unless by a complete perversion of language and misuse of terms.

The confusion to be found in some of the books on this subject is due doubtless to the fact that the fraud referred to has its origin in the effort afterward to set up rights contrary to the conduct of the party, although at the time of the act constituting the estoppel there was the most perfect good faith. The term, as used in such cases, is, as Mr. Pomeroy expresses it, virtually synonymous

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with "unconscientious" or "inequitable." It is in this sense that it may be said that it is a fraud, or fraudulent to attempt to repudiate the conduct which has induced the other party to act, and upon which the estoppel is predicated; but it is entirely another thing to say that the conduct itself—the acts, words, or silence of the party—constituting the estoppel, must be an actual fraud, done with the then intention of deceiving.

It may, therefore, be safely said that although fraud may be, and often is, an ingredient in the conduct of the party estopped, it is not an essential element if the word is used in its commonly accepted sense; and the use of the term is unnecessary, and often improper, unless applied to the effort of the party estopped to repudiate his conduct, and to assert a right or claim in contravention thereof.

The best considered cases are in accord with the views above expressed. *Continental Bank v. Bank of the Commonwealth*, 50 N. Y., 575; *Waring v. Somborn*, 82 N. Y., 604. And although the earlier Pennsylvania decisions generally leaned strongly in favor of the theory that an actual fraud is of the essence of every such estoppel by conduct, it is worthy of note that in the late case in that State of *Bidwell v. Pittsburg*, 85 Pa. St., 412, it is said: "It is not necessary that the party against whom an estoppel is alleged should have intended to deceive; it is sufficient if he intended that his conduct should induce another to act upon it, and the

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other, relying on it, did so act. 2 Pom. Eq. Jur., §§ 804, 805, *et seq.*

The case of *Brant v. Virginia Coal Co.*, 93 U. S., 326, pressed upon us by counsel for complainant, as establishing the contention that fraud is an essential element in the application of the doctrine of estoppel, and that it is essential that the party invoking the estoppel was himself not only destitute of the knowledge of the true state of the title, but also of any convenient or available means of acquiring such knowledge, merits special mention.

In addition to what we have already said as to the first proposition, we will be content to adopt Mr. Pomeroy's note upon this case, where, after quoting freely of the opinion, he says: "With great deference to the opinion of so able a judge, I think his error in this passage is evident. It consists in taking a special rule, established from motives of policy for a particular condition of fact, and raising it to the position of a universal rule. Where an estoppel by conduct is alleged to prevent a legal owner of land from asserting his legal title, courts of equity, in order to avoid the literal requirements of the statute of frauds, were driven to the element of fraud in the conduct as essential. (See the text, §§ 805-807). The passage quoted from Judge Story is dealing with this long settled rule of equity, and not with the subject of equitable estoppel in general. When this special rule is made universal its inconsistency with many familiar instances of equitable estoppel becomes ap-

parent, and Judge Field is forced to escape from the antagonism by denying that these instances do in fact belong to the doctrine. If this conclusion be correct, then some of the most important and well settled species of the estoppel, uniformly regarded as such by text writers and courts, must be abandoned, and the beneficent doctrine itself must be curtailed in its operation to one particular class of cases. This result is in direct opposition to the tendency of judicial decisions and of the discussions of text writers." See note 1 to § 806 of Pomeroy Eq. Jur., and cases there cited.

It is worthy of notice also, that in the opinion referred to Judge Field quotes approvingly from the Pennsylvania case of *Hill v. Epley* (31 Penn. St., 334), language which is practically, to all intents, an abandonment of the extreme position supposed to be maintained in the *Brant* case. The language referred to is: "The primary ground of the doctrine is, that it *would be* a fraud in a party to *assert* what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential *either* in the *intention* of the party estopped, or in the *effect of the evidence* which he attempts to set up." So that at last the difficulty seems to be in the use of terms rather than in the true principles controlling the doctrine under consideration.

As to the second proposition, for which the *Brant* case is cited, it is sufficient to say that it does not sustain the position that the mutuality of the

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mistake, or the possibility of having discovered it, prevents the application of the doctrine of estoppel. It merely asserts the familiar rule that where the party setting up the estoppel knew the true condition of the title, either in fact or in contemplation of law, the doctrine will not avail him. The fact being in that case, as shown in the opinion, that "he knew he was obtaining only a life estate by his purchase."

This opinion is already too long to allow further elaboration on the question of estoppel under the facts of this case. It will, however, not be out of place to add, that I find nothing in the numerous reported cases in this State, from *Patton v. McCluver*, Mar. & Yer., 339, down to *Allen v. Westbrook*, 16 Lea, 251, that makes willful fraud on the part of the party sought to be estopped in the act constituting the grounds of the estoppel essential to the application of the doctrine. We hold, therefore, that there is, in the case at bar, on the facts as found by the arbitrator, every element of an equitable estoppel, and complainants must be repelled. The disability of coverture is not sufficient to defeat this result.

Let the decree of the Chancellor be affirmed, with costs.

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Hyman v. State.

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HYMAN v. STATE.

(Knoxville. October 24, 1888.)

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1. CONSTITUTIONAL LAW. *Title of statutes. Amendatory acts.*

An amendatory act, whose caption merely recites the title of the original act, without enlarging its scope, is constitutional and valid, provided its *purview* is germane to the title of the original act.

Constitution cited: Art. II., § 17.

(See 1 Lea, 734; 15 Lea, 239, 633; 3 Lea, 340; Burnett v. Turner, *post* p. 124.)

2. SAME. *Same. Same. Purview not germane. Sale of intoxicating liquors.*

A statute prohibiting sale of liquors to *drunken husbands* is unconstitutional and void, if enacted, either as an original or amended act, under the caption, "An act to prevent the sale, giving, or delivery of liquors to *minors*." Its *purview* is not germane to its *caption*.

Constitution cited: Art. II., § 17.

(See 12 Lea, 180; 4 Lea, 1; 9 Lea, 374; 3 Leg. Rep., 281.)

Acts cited: Acts 1881, Ch. 90 (unconstitutional); (Code, § 5673 (M. & V.); Acts 1883, Ch. 148.

Cases cited and approved: Cannon v. Mathes, 8 Heis., 518; 14 Ind., 195; 16 Ind., 197; 8 Iowa, 82.

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FROM KNOX.

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Appeal in error from the Criminal Court of  
Knox County. S. T. LOGAN, J.

L. A. GRATZ and D. D. ANDERSON for Hyman.

Attorney-General PICKLE for State.

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Hyman v. State.

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LURTON, J. The defendant below was indicted and convicted for selling liquor to an habitual drunkard after written notice by wife prohibiting such sale.

There was a motion to arrest judgment based upon the supposed unconstitutionality of the act prohibiting such sale, which motion was overruled. The objection urged to the act is, that the title does not embrace the subject legislated upon, in so far as the sale of liquors to habitual drunkards is prohibited.

By the Act of 1881, Chapter 90, the sale or gift of liquors to *minors*, without the written consent of parents or guardian in writing, is prohibited. The title of this act is: "An act to prevent the sale, giving, or delivery of liquors to minors." This act is carried into the Code (M. & V.) at Section 5673.

By the Act of March 26, 1883 (M. & V. Code, Section 5674), it was attempted to amend the Act of 1881 by extending the prohibition to sales or gifts to any husband who is an habitual drunkard, whose wife has given written notice prohibiting such sale or gift. The title of this amending act—"A bill to be entitled an act to amend an act passed March 25, 1881, approved April 4, 1881, entitled an act to prevent the sale or giving or delivering liquors to minors."

The title to the amendatory act in no way indicates the character of the amendment, beyond a correct recital of the title of the act amended. It is not, however, important that the title of an

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amendatory act shall do more than recite the title or substance of the act amended, provided the amendment is germane to the subject of the original act, and is embraced within the title of such amended act. In other words, if the title of the original act is sufficient to embrace the matter covered by the amendment, it is unnecessary that the title of the amendatory act should, of itself, be sufficient. *State v. Bowers*, 14 Ind., 195; *Browder v. State*, 16 Ind., 197; *Morford v. Unger*, 8 Iowa, 82.

By Article II., Section 17, of the Constitution of Tennessee, it is provided that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

The particular ends to be accomplished by requiring the title of an act to express its subject are strongly stated by Judge Cooley, who says: "The object is to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the title gives no intimation, and which might, therefore, be overlooked, and carelessly or unintentionally adopted; and to fairly apprise the people through such publication of legislative proceedings as is usually made of the subjects of legislation that are being considered, in order that they may have an opportunity of being heard thereon, by petition or otherwise, if they shall so desire." Cooley, Cons. Lim., 173.

The precise question to be determined in this case is, whether the title of the original act, entitled "an act to prevent the sale or giving or



delivering liquors to minors," is broad enough to embrace an amendment, not relating in any way to the subject of prohibiting sales or gifts of liquors to *minors*, but which prohibits the sale or giving liquors to *drunken husbands*. We are not at all disposed, as we have frequently announced, to construe this constitutional provision strictly. On the contrary, it should be given a liberal construction so as not to embarrass legislation by a construction unnecessary to the accomplishment of the beneficial purposes for which it was adopted. Yet, as stated by the eminent constitutional lawyer already cited, "the Legislature may make the title to an act as restrictive as they please. It is obvious that they may sometimes so form it as to preclude many matters being included in the act, which might, with entire propriety, have been embraced in one enactment with the matter indicated by the title, but which must now be excluded, because the bill has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title; they are vested with no dispensing power; the Constitution has made the title the conclusive index to the legislative intent as to what shall have operation; it is no answer to say that the title might have been made more comprehensive, if, in fact, the Legislature have not seen fit to make it so." Cooley, Cons. Lim., 179.

It is not to be doubted that the Legislature might have, in one act, prohibited the sale of liquors to both minors and habitual drunkards, and

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that many other classes of persons might have been included within the prohibition. But in such case the title of the act should have been comprehensive enough to have included the several prohibitions.

The title to the act in question is an exceedingly restrictive one. It clearly indicates that the subject of the act is the sale or giving of liquors to *minors*. The subject of the legislation is not the sale or giving of liquors generally, but the sale to a very limited class, to wit, minors. It would never occur to legislator or layman that under such an index would be found legislation prohibiting the sale of liquors to any other class of persons than minors. That the sale to drunken husbands is prohibited by this act is not indicated by the most liberal construction of its title.

Concerning the clause of the Constitution violated by this amendment, this Court, speaking through Chief Justice Nicholson, said: "The command is positive that no law shall embrace more than one subject, and it is equally positive that that subject is to be, or shall be, expressed in the title. To constitute a valid law under this provision, the bill must not only embrace one subject alone, but that subject must be expressed in the title." *Cannon v. Mathes*, 8 Heis., 518.

It follows that the amendment in question has not been constitutionally enacted, and is not therefore a valid law.

The motion to arrest judgment should have been sustained and the prisoner discharged.

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State v. Lee.

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STATE v. LEE.

(Knoxville. October 28, '1888.)

1. CRIMINAL LAW. *Inquisitorial power of grand jury. Riot.*

Grand juries have no inquisitorial power touching the offense of riot.  
(See State v. Lewis, *post* p. 119.)

2. SAME. *Same. Same. Plea in abatement.*

A plea in abatement is sufficient, which avers that a presentment for riot was not found on *knowledge* of the grand jurors, but upon testimony of witnesses called by the jury on the assumption that they had inquisitorial power; although it does not negative, *in express terms*, that the jury may have proceeded upon *information* and *belief*, under § 5906 (M. & V.) Code.

Code cited: §§ 5903, 5906 (M. & V.); §§ 5078, 5081 (T. & S.).

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FROM KNOX.

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Appeal in error from Criminal Court of Knox County. H. R. GIBSON, Ch., sitting by interchange.

Attorney-General PICKLE for State.

D. D. ANDERSON for Lee.

CALDWELL, J. This is a presentment for riot. The defendant filed a plea in abatement, and the State demurred to the plea.

The Court overruled the demurrer; and, upon the failure of the State to take issue on the plea or make any further answer thereto, the action was abated and the prisoner discharged.

The State has appealed in error.

The plea avers, in substance, that the presentment was not found upon the knowledge of the grand jury, or any member of that body; but that it was found upon the testimony of witnesses sent for and examined by the grand jury, upon the assumption of inquisitorial power, when, in reality, no such power existed with respect to the offense charged.

The general grounds of demurrer may be held to assert that it will be presumed that the presentment was found upon the knowledge of the members of the grand jury from the fact that no prosecutor was marked upon the presentment; and *secondly*, that the plea is insufficient upon its face.

Confessedly, the grand jury may, on the knowledge of the body, or any of its members, present a person for engaging in a riot, and when the presentment is so found a prosecutor is not necessary; but it by no means follows, as a conclusion of law, from the absence of a prosecutor, that the presentment, in this case, was found upon the knowledge of the grand jurors. No presumption that it was so found can be indulged against the averments in the plea to the contrary. Hence the first ground of demurrer is not well taken.

The other contention is that the plea is insufficient, because it fails to negative the assumption that the grand jury may have proceeded upon the *belief* of a juror.

The argument of the Attorney-General, as we understand it, is that a presentment may be law-

fully made in cases other than those in which the inquisitorial power exists, either when any member of the grand jury has *knowledge* of an offense, or when he *believes*, an offense has been committed; and that the plea, in the case at bar, only denies that the presentment was based upon such *knowledge*, and does not deny that it was based upon such *belief*, and that therefore the plea is bad.

The language of the statute is: "If a member of the grand jury *knows* or *has reason to believe* that a public offense, indictable or triable in the county, has been committed, he shall declare the same to his fellow-jurors, who shall thereupon investigate it." Code (M. & V.), 5906.

Manifestly this enactment makes it the duty of each member of the grand jury to inform that body not only of such public offenses as may have come within his personal observation, but also of such as he has reason to believe has been committed in their jurisdiction; and in either case, it is the duty of the grand jury to "investigate" the question.

And if, upon such investigation, the grand jurors become satisfied that the offense has been committed, it then becomes their duty to present it to the Court. Code, 5903. They are sworn to do so. Code, 4797, 4798.

The extent of this investigation, however, is not unlimited in all cases. It is to be determined by the offense itself, and the law relating thereto. If it is an offense of which the Legislature has given

the grand jury inquisitorial power, witnesses may be sent for and examined, and upon their testimony a presentment may be based; but if it is an offense, with respect to which inquisitorial power has not been specially granted by statute, the investigation must be confined to the grand jurors themselves, and in such case they can make a lawful presentment only upon knowledge or information possessed within themselves.

The words of the statute, "knows or has reason to believe," are equivalent to *has knowledge or information*.

Then, under this interpretation of the statute, the position of the Attorney-General reduces itself to this: That the plea is bad because it does not negative the fact that the presentment may have been found upon the *information* of some member of the grand jury.

If there were but the one averment in the plea—namely, that the presentment was not found upon the *knowledge* of any member of the grand jury—the position would unquestionably be well taken; but there is another averment in the plea which *does* contain the negation wanting in the averment just mentioned. That other averment is, that the presentment was found *upon the testimony of witnesses sent for and examined by the grand jury*, under the mistaken notion that the inquisitorial power embraced this offense.

The averment that the presentment was based upon the testimony of such witnesses, by necessary

implication, excludes the possibility that it was based upon the information of any member or members of the grand jury.

The inquisitorial power of the grand jury was unknown to the common law, and it exists in this State, with respect to any given offense, only when expressly conferred by statute. The offense charged in the presentment before us, not having been embraced in any statute conferring such power, cannot, therefore, be lawfully presented upon the testimony of witnesses called and examined under a mistaken assumption of the existence of such power.

The plea is a good one.

Let the judgment be affirmed, with costs.

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State v. Lewis.

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STATE v. LEWIS.

(Knoxville. October 30, 1888.)

1. CRIMINAL LAW. *Inquisitorial power of grand jury. Riot.*

Grand juries have no inquisitorial power touching the offense of riot.

Case cited and approved: State v. Lee, *ante* p. 114.

2. SAME. *Same. Same. Motion to quash. Presumption.*

A presentment for riot will not be quashed on motion, because it fails to show upon its face that it was found upon the knowledge or information of the jurors, or because of an unauthorized indorsement by the foreman showing that witnesses were sworn. The presumption, that the grand jury acted regularly and legally, obtains in such case.

Code cited: §§ 5918, 5920 (M. & V.); § 5092 (T. & S.).

Case cited and approved: State v. Darnal, 1 Hum., 292.

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FROM KNOX.

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Appeal in error from Criminal Court of Knox County. H. R. GIBSON, Ch., sitting by interchange.

Attorney-General PICKLE for State.

D. D. ANDERSON for Lewis.

CALDWELL, J. The grand jury of Knox County returned a presentment against Lee Lewis, charging him with having engaged in a riot.

On his motion the presentment was quashed, and



the State appealed in error to this Court. The presentment is in regular form, and signed by all the members of the grand jury.

The first ground of the motion to quash is, that the presentment was found under the inquisitorial power of the grand jury, when in law such power does not extend to the offense charged. The legal proposition here stated is entirely sound. The grand jury has no inquisitorial power with reference to the offense of engaging in a riot, such offense not having been named in any of the statutes conferring that power upon the grand jury. We have so held at the present term in the case of *The State v. Lee*, 3 Pickle, 114.

But the proposition that the presentment before us was found under the exercise of such power, that is, that it was based upon the testimony of witnesses sent for and examined, is one of fact which, in order to sustain the motion to quash, must appear from the presentment itself.

The contention in behalf of the defendant is, that the fact does so appear by presumption and otherwise. In the first place, it is argued that a presentment found upon the knowledge or information of any of the grand jurors shall recite that it is so found; and that the absence of that recital in this presentment affords a presumption that it was not so found, and that, upon the contrary, it was found on the testimony of witnesses called under the inquisitorial power.

This argument is unsound in its statement of

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State v. Lewis.

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the requirement of the law, and, consequently, not sustained in the deduction drawn therefrom.

Neither the law nor the practice has ever required that a presentment, made upon the knowledge or information of the grand jury, should show, upon its face or elsewhere, that it was so made. Indeed, the practice and the policy of the law have ever been against the propriety of such disclosure. *State v. Darnal*, 1 Hum., 292. Therefore, the presumption contended for cannot arise in this case.

It is next insisted that an endorsement on the presentment shows that the presentment was based upon the evidence of witnesses called by the grand jury under the exercise of inquisitorial power. That endorsement is as follows:

“Witnesses: Robt. N. Hood, Richard Childress,  
Welcker Park, Landon George.

Sworn May 28, 1888.

J. L. HOUSEHOLDER,

Foreman Grand Jury.”

Exactly what office this endorsement was intended to serve does not clearly appear. Certainly it has no technical or fixed legal significance as relating to a presentment, for there is no law requiring it.

Where witnesses are called and examined by the grand jury under the inquisitorial power, the fact that they were sworn by the foreman is required

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State v. Lewis.

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to be endorsed upon the *subpœna*, and not upon the *presentment*. Code, 5918.

In the case of an *indictment* the names of witnesses sworn by the foreman of the grand jury are by him to be endorsed upon the *indictment*, but in all cases of *presentment* the names of witnesses so sworn are to be endorsed upon the *subpœna*. Code, 5920.

So, in this case, no legal inference is to be drawn from the endorsement beyond the fact therein stated. It is not stated that the witnesses named were examined upon this presentment, or that it was, to any extent, based upon their testimony. The Court can indulge no presumption that such was the fact.

Again, the grand jury was a sworn body, and as such is presumed to have acted regularly and according to law. It had no legal right to call and examine witnesses in the investigation of the offense here charged, and upon their testimony find the presentment; and it will be presumed not to have done so until the contrary is made to appear affirmatively. We have seen that it does not so appear from the presentment and endorsement thereon, hence the motion to quash, upon the first ground assigned, is bad.

If it be a fact that the presentment was made on the testimony of the witnesses named in the endorsement, it is not a good presentment, but as this fact does not appear from the presentment itself, the question could properly be made by plea in abatement only, and not by motion to quash.

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State v. Lewis.

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Several other objections to the presentment were assigned in the motion to quash, but they are so manifestly not well taken that they need not be further mentioned.

Let the judgment be reversed and the case remanded.

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 Burnett v. Turner.
 

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## \* BURNETT v. TURNER.

(Knoxville. October 30, 1888.)

1. CONSTITUTIONAL LAW. *Amendatory statutes. Recital of act amended. Mechanic's lien law.*

The act approved March 21, 1887, Ch. 85, Acts of 1887, to amend the mechanic's lien law, is unconstitutional and void because it does not recite in its caption or otherwise the substance or title of the act amended as required in § 17 of Art. II. of the Constitution.

Constitution cited: Art. II., § 17.

Act cited: Acts 1887, Ch. 85 (unconstitutional).

(See Hyman v. State, *ante* p. 109.)

2. SAME. *Same. Same. "Revised Code."*

The recitation in this act "that Section 2746 of the Revised Code shall read as follows," is insufficient. There is no "Revised Code" of Tennessee, as a matter of law, and as a matter of fact there are two compilations to which the term "Revised Code" is often applied, and equally applicable. Nothing in this reference indicates which, if either, of these is referred to, and there is, therefore, no identification of the law amended.

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 FROM HAMBLLEN.
 

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Appeal from the Chancery Court of Hamblen County. JOHN P. SMITH, Ch.

O. C. KING and H. H. INGERSOLL for Burnett.

JAMES G. ROSE for Turner.

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 \* Syllabus prepared by Judge delivering opinion.

REPORTER.

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Burnett v. Turner.

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SNODGRASS, J. H. B. Liverman contracted to build and partly built a house for G. K. Turner upon a lot, the title of which was in the wife of G. K. Turner for life, remainder to their son, David Payne Turner, a minor.

Burnet, the complainant, sold to Liverman lumber of which the house was built, and brings this suit to enforce a supposed furnisher's lien thereon under the Act of 1887, entitled "An act to provide a more just and equitable mechanic's lien law, and to afford mechanics, contractors, sub-contractors, and material men greater security for work done and material furnished." Acts 1887, page 165.

In the event a lien could not be enforced on account of the condition of the title, and Mrs. Turner refused to recognize and agree to said lien, then complainant sought to remove the lumber, which was obtained of him, from the building, in pursuance of Section 2 of the act referred to.

The defendants demurred to the bill on various grounds, and the demurrer being overruled, answered. They set up in both the unconstitutionality of the Act of 1887, and insist that if it is valid it can have no such construction as contended for, which would authorize the destruction of the house to reclaim the lumber.

It was further answered and shown that the contract was that of defendant G. K. Turner alone with Liverman; that Liverman was to furnish the lumber and build at a stated price, and it was in-

sisted that Liverman was the "furnisher" in the sense of the statute.

On the hearing the Chancellor held that the complainant was entitled to a lien on the lumber furnished, and ordered a reference to ascertain its amount and value. He then decreed that in the event the value ascertained was not paid the Sheriff should take and remove the lumber from the building and deliver it to complainant.

From this decree complainant appealed, and assigns errors, indicated by statement of defenses of the answer.

In the view we take of it, it is unnecessary to notice any question involved but the constitutional one, as that is conclusive, and though we do not agree with the Chancellor in his construction of the act, we need not even state, much less discuss, the difference in our views on that subject.

The act in question proposes to amend an existing law, and the only reference to the law to be amended is contained in the first section in the declaration: "That Section 2746 of the Revised Code shall read as follows," proposing a substitute for the entire section referred to.

The objection is that the act does not recite in its caption or otherwise the title or substance of the act revised, repealed, or amended, as required in Section 17 of Article 2 of the Constitution of Tennessee.

The objection is well taken. If the act can operate as a valid law, it is upon the idea that it

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Burnett v. Turner.

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eliminates a section from the "Code" of Tennessee and supplies its place with one of corresponding number.

There is no "Revised Code" of Tennessee, the Legislature not having adopted or enacted any compilation of our statutes as such since the enactment of the Code in 1858, which, being the first Code, is not itself a revision. It therefore follows that it is not the amendment of a recognized law to amend the "Revised Code," nor is it necessarily the amendment of a law to amend any section of such supposed Code by number. It may be that in point of fact a given section of any compilation to which the Legislature might refer, and specifically identify in an amending act, would turn out to be a correct reprint of an existing law; but it is not so by force of its existence in such compilation, or by reason of its having a particular sectional number therein, as is the case in the Code enacted. Therefore, to make an amending act valid there must be something more than the recitation in the Act of 1887. It will be remembered that, while we have no "Revised Code" in law, we have in fact two valuable compilations of the statutes of Tennessee, to either of which this term is often applied, and to both of which it can be applied with equal accuracy.

If it be assumed, as argued, that one of them is referred to, it cannot be told which. Neither is identified by any distinctive legal term applicable to it, or more applicable to it than to the



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Burnett v. Turner.

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other. Nor is the identification made or attempted by designation of the compilers or otherwise. So that not only is no law, by title or substance, *recited* in the repealing statute, but no *law* is referred to, and, worse still, no book in which it can be found is named or identified in the reference.

It is argued, however, that it can be made to appear, by inference, that the repealing act was intended to amend the mechanic's lien law contained in the last compilation of our statutes by Milliken and Vertrees, because the amending act designates the number of a section, of which the corresponding number there is upon that subject, while the same is not true of the other compilation. The answer to this is: first, that surely no such inferential method of establishing an amendment could be resorted to in opposition to the plain terms of the constitutional provision cited, requiring that the amendment shall actually "recite the title or substance of the *law* amended"; and second, that such inferential deduction by comparison cannot be made to determine the application of this act or the intent of the Legislature to refer to that "revision," because the act in effect merely strikes out an entire section—not indicating on what subject it is, and therefore not, of course, confining its repealing operation to a section upon the same subject as that to be substituted—and substitutes another. There is no reason why it may not, therefore, as well eliminate and replace the corresponding number in one compilation as the other.

But it is not necessary to pursue this discussion on this line further. The conceded purpose of the Constitution is to prevent the amendment or change of existing laws, even when they are actually in terms referred to, unless the title or substance is recited. A law therefore which proposed to repeal the original act from which number 2746 in the last compilation originated, or one of its amendments—as the Act of 1881—by reference merely to a certain section of a certain chapter of such act without more would be void; as, suppose the Legislature of 1887 had enacted that Sections 1, 2, and 3 of the Act of 1881 (which is the most material amendment to the mechanic's lien law embodied in § 2746, referred to), shall read as follows, and then substituted for them the sections proposed in lieu of "No. 2746 of the Revised Code," no one would controvert that the attempted amendment was invalid. Can it be possible, then, that if a law *enacted* cannot be so amended by such reference to itself it can be amended by a reference more vague to its mere copy or reprint not enacted anywhere as law?

It is argued that we must, per force, adopt a different construction to save amendments to these compilations, now quite numerous, all of which, it is argued, would be invalidated by like construction. To this we answer, first, that this does not affect the merits of the question, if it were conceded, as it is our duty to give the law a proper construction, not to make it or uphold it against

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Burnett v. Turner.

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the Constitution because there may be many like it, or invalid for like reason; and, second, that the conclusion does not follow, as argued, because it is possible to amend a law in such manner and with such specific recitation and identification as the Constitution requires, whether it be referred to in one or another authorized but not enacted compilation, always provided, as was not the case in this instance, the act identifies the book, where it is to be found, and the amended law, with such recitation as the Constitution requires.

It is sufficient for the purpose of this case, and the holding goes no further, of course, that this reference and attempted recitation is insufficient and the act therefore void.

The decree is reversed and the bill dismissed, with cost.

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Nichols v. Allen.

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## NICHOLS v. ALLEN.

(Knoxville. November 1, 1888.)

**1. WILLS. Construction. Takes effect at testator's death. Passes after—  
acquired property.**

Testator made will in 1864 and died in 1876. He acquired much personality between those dates. The will provides: "I have an undivided interest in the real and personal estate of my father and mother, aside from some other personal property in my own right, all and singular of which I do hereby give and bequeath the same to my said two sisters and to my brother (naming them) jointly, to share and share alike in the same."

*Held*: That this will speaks and takes effect as of date of testator's death, and passes all personality acquired between the date of its execution and testator's death.

(See Code, § 3035 (M. & V.); § 2195 (T. & S.).

Case cited and overruled: *Sharpe v. Allen*, 5 Lea, 81.

TURNER, C. J., and SNODGRASS, J., dissent.

**2. SAME. Same. Not res adjudicata.**

Decree on demurrer, construing a will, in a suit by *one distributee* of the testator against the *executor and legatees* is not available as *res adjudicata*, in a subsequent suit by *another distributee*, against the same parties for a like purpose.

(See 86 Tenn., 81, 318.)

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FROM COCKE.

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Appeal from Chancery Court of Cocke County.  
JNO. P. SMITH, Ch.

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Nichols *v.* Allen.

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G. W. Allen made the will set out in the opinion, in 1864, and died in 1876, having in the interval acquired a large amount of personal property. He was never married. His heirs and next of kin were eight brothers and sisters and their descendants. He provided for only three of these under his will.

Mrs. Sharpe, a sister of testator, filed her bill against the executor and beneficiaries under said will—who were claiming the entire personal estate under its bequests—averring, among other things, that the testator had died intestate as to this after-acquired property, and seeking to recover her distributive share. Her contention was sustained by this Court. See *Sharpe v. Allen*, 5 Lea, 81.

Afterward complainants in this case filed their bill as distributees of said G. W. Allen, deceased, to recover their respective shares of his estate. The Chancellor gave decree in their favor, in accord with the majority opinion in *Sharpe v. Allen*, 5 Lea, 81. Defendants appealed, and assigned errors.

J. C. HODGES for Complainants.

PICKLE & TURNER and W. J. McSWEEN for Defendants.

SNODGRASS, J. The determination of this case depends upon the construction of G. W. Allen's will, made in 1864. The clause to be considered is as follows:

"I have some real and personal property, and I do hereby make the following disposition of it: *First*, I have a tract of land of two hundred and fifty acres, lying on the south side of French Broad river, between the lands of Wm. Burnett and the mouth of Wolfe Creek, which I hereby give and bequeath to my two sisters, Emily Allen and Cynthia Cowan, and to their heirs forever, the title to which is hereby vested in them. *Second*, I have an undivided interest in the real and personal estate of my father and mother, aside from some other personal property in my own right, all and singular of which I do hereby give and bequeath the same to my said two sisters, Emily Allen and Cynthia Cowan, and to my brother, Greene Allen, jointly, to share and share alike in the same."

The testator acquired other personal property, and died in 1876, having made no other will.

The question is, did after-acquired property pass under the will?

In another case, *Sharpe v. Allen*, reported in 5 Lea, page 81, this will was before this Court for construction at the September Term, 1880. It was then held by a divided Court that after-acquired property did not pass under this will. Both the majority and minority opinions are published, and they discuss the question fully. That discussion need not be repeated here.

The question having again risen in this case upon a state of facts and pleadings involving no *res adjudicata*, the majority of the Court is of opinion

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Nichols *v.* Allen.

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that the construction given in the case of *Sharpe v. Allen* is not the correct one, and that the case should not be allowed to stand as a precedent.

It is, therefore, overruled, and the will held to convey after-acquired property. The decree of the Chancellor is consequently reversed, with costs. In this conclusion Judge Turney and I do not concur. We think the former construction should be adhered to.

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Steffner v. Burton.

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## STEFFNER v. BURTON.

(Knoxville. November 8, 1888.)

**COSTS.** *Successful plaintiff liable for, when.*

A successful plaintiff, in an action for false imprisonment and assault and battery, whose recovery of *damages* does not *exceed* five dollars, is liable for *all costs* of the suit, except an amount equal to the damages recovered; and judgment should be rendered accordingly.

Code construed: §§ 3921, 3922 (M. & V.); §§ 3197, 3198 (T. & S.).

Case cited and overruled: *Gardenhire v. McCombs*, 1 Sneed, 83.

(In *slander* plaintiff is liable for costs if he recovers *under* five dollars damages. Code, § 4138 (M. & V.)

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FROM SULLIVAN.

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Appeal in error from Circuit Court of Sullivan County. A. J. BROWN, J.

C. J. ST. JOHN and N. M. TAYLOR for Steffner.

W. D. HAYNES for Burton.

CALDWELL, J. Burton sued Steffner and others for \$1,000, as damages for false imprisonment and assault and battery.

The case was tried by the Circuit Judge without a jury. He found the issues in favor of the plaintiff, assessed his damages at \$5.00, and rendered



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Steffner v. Burton.

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judgment against the defendant for that sum and *all costs*.

Steffner and his co-defendants have appealed in error to this Court.

The only assignment of error is with respect to the adjudication of costs, the contention of appellants being that they cannot lawfully be required to pay more than five dollars costs, because the damages assessed against them do not *exceed* five dollars.

The disposition of court costs has been a fruitful subject of legislative enactment. Since 1794 the rule has been that the successful party, in all civil actions, is entitled to judgment for full costs, unless otherwise directed by law. Acts 1794, Ch. 1, Sec. 74 (Car. & Nich., p. 188); Code (M. & V.), 3921.

Prior thereto, in 1715, it had been enacted that a plaintiff in an action of slander, who recovered "damages under five dollars," could recover "only so much costs as damages." Acts 1715, Ch. 27, Sec. 8 (Car. & Nich., p. 188).

And, therefore, in 1811, it was enacted that in suits for the recovery of damages occasioned by the overflowing of water by the erection and operation of a grist-mill, or other water-works of utility, the plaintiff shall *in no instance recover a greater sum in cost than the damages assessed by the jury*; and that the residue of the costs should be adjudged against the plaintiff. Acts 1811, Ch. 91, Secs. 1 and 2 (Car. & Nich., p. 189).

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In 1829 it was enacted that in all civil actions for assault, assault and battery, malicious prosecution, and false imprisonment, the "plaintiff shall recover no more costs than damages unless the amount of damages given him shall *exceed* the sum of five dollars." Acts 1829, Ch. 1, Sec. 1 (Car. & Nich., p. 190).

Each of these acts last named made an exception to the general rule that the successful party is entitled to recover full costs; and yet no two of them made the same provision with respect to costs.

By the act of 1715 the plaintiff in the given case was deprived of his right to recover *full costs* only when his recovery of damages was for a *less* sum than five dollars, in which event he was allowed to recover only so much cost as damages; by the act of 1829 he was denied *full costs* where his recovery of damages was not for a *greater* sum than five dollars; and by the act of 1811 he could *in no event* recover more costs than damages, whether the damages recovered be less or greater than five dollars.

This lack of harmony in these statutes must have been in the minds of the legislators when, in 1852, the foregoing provisions of the Act of 1811 were repealed; and, instead thereof, another act was passed providing that, in suits for damages occasioned by the overflowing of water from the same cause mentioned in the act repealed, the successful plaintiff should recover full costs, except

when his judgment for damages should not *exceed* five dollars, in which case he should recover no more costs than damages. Acts of 1851-2, Ch. 146, Sec. 1.

This enactment brought the different classes of actions mentioned in the Acts of 1811 and of 1829 within the same special rule, or the same exception to the general rule with respect to costs; but it left the matter of costs in an action for slanderous words subject to the other special rule provided by the Act of 1715.

It would seem that this remaining want of conformity in the law of costs was observed and intended to be overcome by the compilers of our Code, who compressed the several provisions into one section, as follows:

"In all civil actions founded upon assaults, assaults and battery, malicious prosecution, false imprisonment, slanderous words, or for the recovery of damages for overflowing of water by the erection of a grist-mill, or other water-works of utility, the plaintiff recovers no more costs than damages, unless the recovery *exceed* five dollars": Code of 1858, Sec. 3198; Code (M. & V.), 3922.

But as a matter of fact, and notwithstanding actions for *slanderous words* are expressly included in the section just quoted, the provision for costs in the Act of 1715 was compiled separately, and placed under its appropriate head of "Slander and Libel," in a subsequent chapter and section of the Code, in these words:

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“Where the verdict in slander is *under* five dollars, the plaintiff shall recover no more costs than damages.” Code of 1858, Sec. 3402; Code (M. & V.), 4138.

Since the adoption of the Code of 1858, Section 3402, and not Section 3198, has been held to be the law in an action of slander, and a plaintiff in such an action, with a judgment for the sum of five dollars damages, has been allowed to recover all costs. *Bates v. Sullivan*, 3 Head, 633-4.

Nevertheless, as to the other actions therein enumerated, Section 3198 is controlling in matters of costs, and by its provisions the present case must be determined, this action being for false imprisonment and assault and battery, and the damages assessed not *exceeding* five dollars.

It matters not that the damages were assessed by the Circuit Judge instead of a jury; for, by the statute permitting parties litigant to waive their right of trial by jury, and by the uniform practice of this Court, the finding of the facts by the Circuit Judge, when the trial by jury has been waived, as was done in this case, is treated as the verdict of a jury. The finding of the trial judge that the plaintiff had been damaged to the extent of five dollars by the wrongful acts of the defendants, has the same force and virtue as the verdict of a jury assessing his damages at the same amount would have possessed; and the rules of law applicable to the costs of the litigation in the one

case are the same as those that would be applied in the other case.

We have seen that this case falls within an exception to the general rule, that the successful party is entitled to recover all costs from his unsuccessful adversary, and that the statute making this exception will permit the plaintiff in this case to recover only so much costs as damages, the damages not being *in excess* of five dollars. But it may be said that there is no express provision on the face of the act for the disposition of the balance of the costs. That is true—there is no such express provision; nevertheless, we think there can be no serious difficulty in determining what disposition the law-makers intended should be made of the balance of the costs in such a case.

All costs must be paid by some party or parties to the litigation, and it is the duty of the Court to adjudge all the costs in every case. Hence, when it is enacted that in a certain case and contingency the plaintiff shall recover only a given amount of the costs, it follows by necessary implication that the legislators intended that the defendant in such a case and contingency should have a recovery for the residue of the costs.

The object of this legislation was to prevent frivolous and vexatious litigation—to keep parties out of court when the injury done was so trivial in its nature and extent that a recovery could not be obtained for more than five dollars damages. The object is praiseworthy, the enactment of a

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wholesome law which should be cheerfully enforced by the courts.

We hold, therefore, that the assignment of error is well made, and that the plaintiff is liable for all costs in excess of five dollars.

In the case of *Gardenhire v. McCombs*, 1 Sneed, 83, a different result was reached, and each party was required to pay his own costs, after allowing the plaintiff a recovery against the defendant for one dollar of costs, that being the amount of damages recovered. That was an action for damages occasioned by the overflowing of water on the plaintiff's land, and the costs were adjudged under the Act of 1852, the principal object of which was held to have been the relief of the plaintiff in such a case from the payment of that part of the costs in excess of the sum recovered as damages. That such was the principal object of the Act of 1852 was inferred from the fact that it repealed the second section of the Act of 1811, which, in terms, provided that the plaintiff should pay all costs beyond the amount of damages recovered by him.

We think that inference was not well drawn from the fact stated, or from anything else appearing in the Act of 1852 or elsewhere, and that the decision in that case was unsound, and should not be followed as a precedent.

The object of the Act of 1852 must have been, as the result was, to bring that class of actions referred to in the Act of 1811 within the same

special rule (relating to costs) which had in the meantime been established with respect to other actions by the Act of 1829. And the manifest purpose of all these enactments, that of 1715, 1811, 1829, and 1852, was to discourage frivolous and vexatious litigation.

But if the *Gardenhire* case were approved upon its own reasoning it would not control the case at bar, because that reasoning has no application to this case, which in no sense stands upon the Act of 1852 or of 1811, but entirely upon the Act of 1829, as brought into the Code, without change in meaning.

As to costs, the judgment is reversed, and judgment will be entered here in favor of Barton for five dollars as damages, and for the same amount as costs. The residue of the costs below and all the costs of this Court are adjudged in favor of appellants, and against Barton.

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Threat v. Moody.

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THREAT v. MOODY.

(*Knoxville*. October 28, 1888.)

**HOMESTEAD.** *Widow's right of. Under Code of 1858 and subsequent acts.*

Widow's right to homestead is determined by the laws in force at date of her husband's death; therefore, where the husband, being "head of a family," died in this State in 1863, owning land, his widow is not entitled to homestead under the laws subsequently enacted; nor under then existing laws, unless the husband had filed declaration of his intention to claim homestead.

Acts cited: Acts 1867-8, Ch. 85; Acts 1870 (second session), Ch. 80; Acts 1879, Ch. 171.

(See Code, §§ 2935-2946 (M. & V.); §§ 2113a-2122a (T. & S.).

Cases cited and distinguished: *Vincent v. Vincent*, 1 Heis., 343, 344; *Merriman v. Lacefield*, 4 Heis., 209.

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FROM FENTRESS.

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Appeal from Chancery Court of Fentress County.  
T. W. WADE, Sp. Ch.

S. N. VANCE for Complainant.

L. T. SMITH and WASHBURN & TEMPLETON for  
Defendants.

FOLKES, J. This case was tried in the court below on bill and answer.



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Threat v. Moody.

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The question presented for our determination is one of homestead, and arises upon the following state of facts:

Jonathan Moody died intestate at his home in Fentress County in 1863, residing upon and the owner of the land described in the bill. He left surviving him his widow, Lottie, now the wife of defendant Elijah Waters, and two children, then minors, both of whom were adults when this bill was filed. Collier Moody, one of the children, has sold and conveyed his interest in his father's estate to complainant, who files his bill against the widow and her present husband and against the other child of Jonathan Moody, Nancy Moody, seeking a partition of the lands. The widow has been in possession of and resided upon said land since the death of her husband, with the two children as members of her family, until their majority, the daughter still living with her and her present husband.

The widow insists that she is entitled to have a homestead of the value of one thousand dollars, as fixed by the Act of 1870, set apart to her, and if mistaken in this, then to a five hundred dollar homestead, under Code of 1858, and to have dower allotted.

Complainant admits that she is entitled to dower, but denies her right to homestead.

The Chancellor allowed the claim for dower, but refused homestead, and the case is here on the appeal of the widow and her present husband.

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Threat v. Moody.

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There is no error in the decree complained of.

The homestead to which the widow and children are entitled is governed by the law in force at the time of the husband's, or father's, death.

Both under the Code of 1858 and the acts subsequent thereto the homestead exemption is to the housekeeper or the head of the family, and it is to his rights that the widow and children succeed.

Under the Code of 1858, which was in force at the time of the death of Jonathan Moody, this homestead exemption was not to exceed in value five hundred dollars, and to be entitled to this such "housekeeper or head of a family" was to have recorded in the register's office of the county where the land lay a declaration of his intention to claim such exemption.

By the same act "the homestead *exempt in the hands of a husband* [the italics are ours] shall, upon his death, go to his widow during her natural life or widowhood; upon the death or marriage of the widow, to go to the minor children of the deceased husband." So that it is clear that if the widow in this case had applied for homestead prior to the Act of 1870, which repealed the provisions of the Code of 1858, above referred to (as also the Act of 1867-8, Chapter 85, amendatory thereof), she would have been repelled, because her husband was not himself entitled to such exemption by reason of his failure to make and register the declaration of intention; and if the application had

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Threat v. Moody.

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been made after her marriage with her co-defendant, Elijah, she would have been repelled for that reason, even had there been a declaration of intention; or rather she would, by such marriage, have lost the right had she otherwise possessed it, and, if existing, it would, as we have seen, passed to the children of the first marriage.

For the widow counsel insist that the registration of the declaration of intention was for the benefit of creditors merely, so as to give them notice of their debtor's intention, and does not apply to the *right of homestead* as between the widow and the children; and that the *homestead right having survived to the wife*, the provision forfeiting the right by re-marriage having been repealed, the wife is now entitled to assert her rights, and that the homestead acquired under the Act of 1868 was entitled to the benefit of the extensions contained in the Acts of 1870 and 1879.

These contentions all *assume*, instead of establishing, the question which lies at the root of the controversy. They assume the "right of the wife to homestead," and then address themselves to the effect of the acts subsequent to the Code of 1858, repealing the forfeiture clause for re-marriage and repealing the clause as to declaration of intention and enlarging the value to one thousand dollars, apparently losing sight of the fact that the wife or widow has no homestead rights to be repealed or enlarged, except such as her husband enjoyed

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at the time of his death, and which, by his death, passed to her.

He having no homestead rights at the time of his death, under the law as it then existed, she can have none in his lands.

The distinction between this case and the cases of *Vincent v. Vincent*, 1 Heis., 343-4, and *Merriman v. Lacefield*, 4 Heis., 209, relied on by counsel for the widow, is obvious.

These cases adjudge that, under the provisions of our statute, § 2288, T. & S. Code, which enacts that "property exempt by law from execution shall, on the death of the husband, be exempt from execution in the hands of and be vested in the widow," etc. The words "property exempt by law from execution" are not restricted to the specific articles enumerated in the Code, but embrace all property which may thereafter be exempted by legislative enactment.

This is merely the announcement of the familiar rule of construction that "a remedial statute shall be extended to later provisions by subsequent statutes."

The effect of which was to give to the widow not only the articles enumerated in the statute as exempt at the time of the passage of the act entitling her to her husband's exemptions at the time of his death, but to give her such additional articles as had, by subsequent legislation, been exempted to her husband.

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But there, as here, her rights are dependent upon what were her husband's exemption rights under the statute of which she seeks to avail herself.

We hold, therefore, that the rights of the widow and children concerning homestead are determined by the law in force at the time of the death of the husband or father. See Thompson on Homestead, § 543.

The decree of the Chancellor is affirmed and cause remanded for the allotment of dower, which must include the mansion house, etc., but the value of the improvements is not to be regarded in estimating the quantity of land to be assigned her unless the improvements cannot be assigned without manifest injustice to the children, etc., as provided in §§ 3248, 3249, M. & V's Code, and construed in 1 Heisk., 333, and 5 Bax., 640.

The costs of this Court will be paid by Elijah Waters, and the costs below as may be adjudged by the Chancellor.

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## HOMESTEAD.

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### I. STATUTES.

#### 1. CODE OF 1858, §§ 2114-2123.

Under Code of 1858, "each housekeeper or head of a family in this State" was allowed a homestead worth five hundred dollars out of real estate occupied by him and including mansion and out-houses, provided he had registered a declaration of his intention to claim it. After its assignment the husband could not alien the homestead with-

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out the wife's joinder in his deed; and upon his death it passed to his widow "during life or widowhood," then to his minor children; and upon failure of both, it went first to pay the husband's debts, then the wife's, and then to the husband's heirs.

2. ACTS 1866-7, CH. 36.

Made leasehold estates of two to fifteen years subject to homestead exemption, except as to rents.

Code, §§ 2938, 2939 (M. & V.); §§ 2113a, 2113b (T. & S.).

3. ACTS 1867-8, CH. 85 (March 12, 1868).

Extended homestead exemption to equitable estates, increased its value to one thousand dollars, and dispensed with declaration of claimant's intention. (See 11 Heis., 45.) It excepted purchase money and previous contracts.

4. ACTS 1870, CH. 80 (June 27, 1870).

Passed to enforce Art. XI., § 11, of the Constitution. It repeals the provisions of the Code of 1858, and the Act of 1867-8, Ch. 85.

See Code, §§ 2114a-2122a (T. & S.); Shankland, pp. 117-119.

5. ACTS 1873, CH. 98.

Provides for assignment of homestead and dower.

Code, § 2944 (M. & V.); § 2119b (T. & S.) Addenda.

6. ACTS 1879, CH. 171 (March 26, 1879.)

Amended Act of 1870 so as to dispense with the requirement of occupancy, and gave claimant the right of election.

Code, § 2935 *et seq.* (M. & V.).

## II. DECISIONS.

### ABANDONMENT.

By widow's removal to another State with infant child. (Act 1870); 1 Bax., 42.

*Aliter* as to child since Act of 1879. 16 Lea, 470.

Infant's removal by his guardian is not. (Act 1870); 13 Lea, 120.

By permanent removal of husband and wife from the premises. (Act 1870); 2 Lea, 633, 237; 9 Lea, 176; 11 Lea, 478; 14 Lea, 336; 4 Lea, 672.

Temporary removal to serve as jailer is not. (Act 1870); 9 Lea, 671.

### ALIENATION. (See Waiver, Fraudulent Conveyance.)

By joint deed of husband and wife. 9 Bax., 299, 393; 4 Lea, 672.

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Of *assigned* homestead by husband's deed without wife's joinder, invalid. (Act 1868); 1 Bax., 220; 4 Bax., 232; 8 Lea, 389; 9 Lea, 563. Otherwise as to unassigned homestead. *Id.*

By husband's deed without wife's joinder invalid, and cloud upon title. (Act 1870); 7 Bax., 116; 1 Lea, 543; 15 Lea, 527; 1 Leg. Rep., 316; 2 Leg. Rep., 248; 1 Bax., 220; 2 Tenn. Ch., 606.

By deed signed but not acknowledged by wife, invalid. (Act 1870); 1 Lea, 543; 10 Lea, 630.

By deed properly executed by wife but purporting to be the husband's alone, invalid. 2 Tenn. Ch., 606; 2 Lea, 271.

Husband alone may alien all his lands, reserving his homestead. 6 Lea, 659; 11 Lea, 228.

His deed passes the remainder interest in homestead. 1 Lea, 543; 1 Leg. Rep., 22; 2 Leg. Rep., 248; 15 Lea, 527.

By deed of deserted husband; effect. 11 Lea, 478.

Infant's rights not affected by widow's deed. (Act 1879); 16 Lea, 470.

Husband's mortgage, after Act of 1870, for debt contracted before, defeats homestead. 11 Lea, 327; but see 1 Bax., 220.

Express waiver in deed not essential. 9 Bax., 393, 299; 5 Lea, 100; 2 Lea, 237; 6 Lea, 575; 86 Tenn., 451; 2 Leg. Rep., 68.

Not by husband's acts *in pais* under Act 1868. 11 Lea, 642.

## ASSIGNMENT. (See Value.)

Commissioners must be freeholders, and not related to parties. 7 Cold., 153.

As to fees of. (See Code, § 5333 (M. & V.).

Proceedings may be reviewed by *certiorari*. 7 Cold., 153.

By County Court in insolvent proceedings proper. 6 Lea, 605.

By Circuit Court in action of ejectment proper. 9 Lea, 545; 10 Lea, 564.

Officer's failure to set it apart does not defeat homestead. 4 Lea, 212.

Sale, subject to unassigned homestead, valid. (Act 1879); 16 Lea, 371.

Mode of assigning dower and homestead. 1 Leg. Rep., 281; (Acts 1873, Ch. 98).

Re-assignment not allowed. 6 Lea, 379.

Sheriff, not necessary party to bill for assignment of homestead out of lands ordered to be sold under attachment. 1 Tenn. Ch. R., 174.

## CONSTITUTIONAL QUESTIONS.

Homestead laws allowing or increasing the exemption cannot operate upon pre-existing contracts. 11 Heis., 48; 1 Bax., 220; 6 Bax., 225; 7 Bax., 384; 11 Lea, 327; 1 Lea, 384.

Requirement that wife shall join in conveyance of homestead may operate retrospectively. 1 Bax., 220.

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So as to liability for torts, homestead laws may be retrospective. 6 Lea, 406.

## CONSTRUCTION.

Of homestead laws should be liberal. 11 Heis., 515; 9 Lea, 548; 11 Lea, 649.

## DEBTS. (See Purchase Money.)

Homestead exemption is allowed against—

- Money borrowed to pay for land to which it attaches. 4 Lea, 212. (But see 1 Lea, 228.)
- State's claim against delinquent tax collector. 11 Lea, 642.
- Liability for a tort, when. 6 Lea, 406.
- Debts created since Act 1868, and prior to Constitution and Act 1870, \$1,000 exempt. 11 Heis., 45; 1 Bax., 220. *Aliter*, as to debts created prior to Act 1868. 6 Bax., 225; 7 Bax., 384; 1 Lea, 384.

Exemption is not allowed against—

- Novated or other purchase money debt. 3 Lea, 353; 1 Lea, 228; 5 Heis., 58. (But see 4 Lea, 212.)
- Debts created prior to Act, though reduced to judgment or revived by new promise since. 9 Bax., 592; 7 Bax., 384.
- Debts created for improvements, whether secured by mechanic's lien or not. 9 Bax., 216; 11 Lea, 327; 1 Leg. Rep., 209.

## ESTATES AND LANDS.

Homestead is a life estate. 13 Lea, 622; 1 Leg. Rep., 23.

Estates and lands subject to homestead—

- Life estates. 9 Lea, 548.
- Equitable estates. 13 Lea, 622; 3 Tenn. Ch., 550.
- All of debtor's lands, whether occupied or not, since Act 1879. 15 Lea, 527.

Estates and lands not subject to homestead—

- Lands leased on shares. (Act 1870); 9 Bax., 612.
- Undivided interests. (Act 1870); 3 Lea, 76.
- Lands purchased by fraudulent conversion of debtor's assets. 2 Leg. Rep., 74.
- Lands purchased by guardian with his ward's funds. 3 Lea, 634.
- Lands purchased with partnership assets. 3 Lea, 118.
- Lands fraudulently conveyed by husband and wife to third person, and by that person to the wife. *Cowan v. Johnson* (MSS.), cited in 2 Lea, 183; 3 Lea, 302; 8 Lea, 395; 3 Tenn. Ch., 553.
- Remainder interest in homestead. 2 Lea, 579; 3 Lea, 203.



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## FRAUDULENT CONVEYANCE.

Reservation of homestead in deed is not badge of fraud. 2 Lea, 511; 6 Lea, 49.

Of husband to wife—effect on wife's right to homestead. 2 Lea, 180; 3 Lea, 302; 8 Lea, 389.

Purchase of homestead, with debtor's individual or firm assets, or with his ward's funds, fraudulent. 2 Leg. Rep., 74; 3 Lea, 634, 118.

## HUSBAND AND WIFE.

Husband procuring wife to join in mortgage to be considered creditor's agent. 9 Lea, 204.

Wife may by next friend, or jointly with her husband, maintain bill *quia timet* to set aside husband's deed as cloud on title. 7 Bax., 116; 1 Lea, 543; 1 Leg. Rep., 316, 326.

## IMPROVEMENTS.

No exemption as to debt created for. 9 Bax., 216; 11 Lea, 327; 1 Leg. Rep., 331.

## NON-RESIDENT.

Not entitled to homestead. 1 Bax, 42; 14 Lea, 369; 87 Tenn., 78.

## OCCUPANCY.

Essential as to husband and wife. (Act 1870); 2 Lea, 633; 9 Lea, 176; 14 Lea, 336; (but see 11 Heis., 515.)

As to infants. (Act 1870); 1 Bax., 42; *contra* 13 Lea, 120.

Lessor, not occupant of land. (Act 1870); 9 Bax., 612; 11 Lea, 478.

Using lot as garden, though not residing on it, is occupancy. (Act 1870); 11 Heis, 515.

Not essential since Act 1879. 15 Lea, 527.

## MARSHALING SECURITIES.

(See 11 Lea, 391; 86 Tenn., 451, 659; White v. Fulghum, *post*, p. —, overruling 11 Lea, 391.)

## PERSONS ENTITLED TO HOMESTEAD.

## Head of family—

—Husband, who has lost wife and children after acquiring homestead. 5 Lea, 722.

—Widow, living on dower with orphan children of relatives. 2 Tenn. Ch., 33.

—Widower with two children. 3 Tenn. Ch. R., 464; (see generally 1 Lea, 751; 3 Hum., 216; 8 Bax., 420.

## Widow and children—

—Widow, as against adult heirs or devisees. (Act 1870); 1 Lea, 701; 87 Tenn., 78. *Aliter* under Act 1868. 9 Bax., 127.

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Threat *v.* Moody.

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- Widow entitled to both homestead and dower. (Act 1870); (see Acts 1873, Ch. 98); 1 Lea, 701; 1 Leg. Rep., 281. *Aliter* under Act 1868. 9 Bax., 127; 4 Heis., 220; 1 Leg. Rep., 328.
- Widow of an insolvent testator without dissent. 4 Lea, 671.
- Widow, removed from premises by husband, entitled against husband's vendee. (Act 1870); 1 Leg. Rep., 28.
- Widow entitled in remaining lands, though husband had conveyed to her other lands. 85 Tenn., 211.
- Infant removed by its guardian. (Act 1870); 13 Lea, 120; (but see 1 Bax., 42.)

Delinquent tax collector as against the State. 11 Lea, 642.

As to liability on guardian's bond renewed after homestead acts. 10 Lea, 630; (see also 11 Lea, 327.)

PERSONS NOT ENTITLED.

Non-resident widows. (Act 1870); 14 Lea, 369; 87 Tenn., 78; 1 Bax., 42.

Widow, as against adult heirs under Act 1868. 9 Bax., 127.

Heirs, in lands descended, as against their ancestor's debts contracted prior to 1868. 1 Lea, 384.

Widow and heirs under statutes giving them exempt property. 9 Bax., 127; 4 Heis., 209.

Widow who had eloped. 87 Tenn., 78.

Wife, where marriage is void. 7 Lea, 448.

Wife, where, after sale of husband's other lands by his deed or under execution, she joins in conveyance of homestead. (Act 1870); 6 Lea, 659; 85 Tenn., 351.

PURCHASE MONEY.

What is purchase money. 1 Lea, 228; 3 Lea, 353; 5 Heis., 58.

What is not. 4 Lea, 212.

REMAINDER INTEREST.

May be sold for decedent's debts. 2 Lea, 579.

Or under execution. 3 Lea, 203; 9 Lea, 545; 10 Lea, 564; 16 Lea, 371.

Or conveyed by husband's sole deed. 1 Lea, 543; 15 Lea, 527; 1 Leg. Rep., 22; 2 Leg. Rep., 248.

SALE OF HOMESTEAD.

For re-investment. 3 Lea, 354; 3 Tenn. Ch., 465.

VALUE.

Once valued, no re-valuation allowed. 6 Lea, 379. (Unless perhaps for fraud. *Id.*)

Fixed by value of the *fee*. 9 Lea, 545; 13 Lea, 622.

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Threat *v.* Moody.

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**WAIVER.**

Express, not essential in deed. 9 Bax., 393, 299; 5 Lea, 100; 2 Lea, 237; 6 Lea, 575; 86 Tenn., 451.

Not effected, under Act of 1868, by husband's acts *in pais*. 11 Lea, 642.

By wife's joinder in conveyance of homestead after husband's other lands have been sold, homestead in the latter is defeated. 11 Lea, 228; 85 Tenn., 351.

**WIDOW AND CHILDREN.** (See Persons.)

CASES

87 155  
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ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1888.

UNIVERSITY OF THE SOUTH *v.* SKIDMORE.

(*Nashville.* December 18, 1888.)

1. TAXATION. *Charter exemption to corporation. Dependent on title, not use.*

Charter exemption of realty "from taxation *so long as said land belongs to*" an incorporated institution of learning, remains in force so long as *title* remains in the corporation. It does not depend upon the *use* made of the property.

2. SAME. *Same. Legislative power under Constitution of 1834.*

The power of the Legislature, under the Constitution of 1834, to grant such special exemption of realty to a corporation by charter provision, is well settled by adjudications, and is not now an open question.

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University of the South v. Skidmore.

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Cases cited and approved: Railroad v. Hicks, 9 Bax., 442; State v. Butler, 86 Tenn., 614; *In re* Union and Planters' Bank, 13 Lea, 407.

3. SAME. *Same. Exemption dependent alone on title not defeated, when.*

A university entitled under its charter to exemption of its realty from taxation *so long as it retains the title* thereto, does not so far renounce title as to defeat the exemption, by giving leases thereof for terms of from one to thirty-three years, with renewal options, to divers persons, who build up a village thereon—the annual rents being reserved and devoted exclusively to the purposes of the university.

Case cited and approved: North-western University v. People, 99 U. S., 309.

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FROM FRANKLIN.

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Appeal from the Chancery Court of Franklin County. W. S. BEARDEN, Ch.

A. S. MARKS for University.

Attorney-General PICKLE, J. J. WILLIAMS, ESTILL & WHITAKER, and W. H. BRANNON *contra*.

EDWARD H. EAST, Sp. J. I am directed by the Court to deliver the following opinion in these consolidated cases:

The University of the South filed its original injunction bill against A. J. Skidmore, Trustee of Franklin County, enjoining him from proceeding to assess for taxation for *State* purposes certain property belonging to complainants. Franklin County filed its bill against the University of the South

to collect taxes which had been assessed against said university, and to have the lien of the county declared by decree and the taxes collected by sale of the property, or otherwise.

The University of the South was chartered by the Legislature of Tennessee on the sixth day of January, 1858, and is under the control and patronage of the Protestant Episcopal Church. The pleadings and evidence disclose the following facts:

The tenth section of the charter of this university is as follows:

"SEC. 10. *Be it further enacted, That said university may hold and possess as much land as may be necessary for the building, and to such an extent as may be sufficient to protect said institution, and students thereof, from intrusion of evil-minded persons who may settle near said institution; said land, however, not to exceed ten thousand acres, one thousand acres of which, including buildings and other effects and property of said corporation, shall be exempt from taxation so long as said land belongs to said university.*"

The one thousand acres have been laid off as designated by metes and bounds, and upon this the buildings of the university have been erected, together with professors' houses, etc. A part of this one thousand acres along the line of the railroad has been subdivided into town lots, streets laid off and graded; along these dwelling-houses and store-houses and a hotel have been erected, and rented to persons upon leases extending from one year to

thirty-three years, and with renewal options given to the tenants in some instances; making in all three hundred houses, and constituting the village of Sewanee. These lands, and the entire property of the corporation, were given to it by liberal-minded donors originally or from time to time. The assessments complained of were made and sought to be made upon the one thousand acres of real estate and improvements so rented or leased, excluding therefrom the university buildings proper and a church, but including the houses of professors.

With the exclusion mentioned, the assessing officers seek to assess this one thousand acres, and improvements thereon, for the current year, and also under the special statute of the State passed in 1885 and amended in 1887, empowering "back assessments" for the years 1884, 1885, and 1886, as follows: For 1884, \$98,710; for 1885, \$99,360; for 1886, \$105,250; and for the current year (1887) about \$100,000.

It is shown that all emoluments and profits arising from leases, amounting to some twelve or fifteen hundred dollars per year, were used and devoted by the corporation to the purposes of the university, and not otherwise. The university is evidently seeking by these leases to raise an income, endowment, or sustentation fund, with which to carry on the institution and promote and extend its usefulness as an educational institution by a judicious use of its real estate and turning back

to the institution all incomes and rents so derived, to be used for the purposes of the institution, and thus make the property contribute to these ends. It is claimed that this action of the corporation in using its property as stated is a use not contemplated by the Legislature, and deprives it of the exemption from taxation which, under the tenth section of the charter, it would be entitled to.

The Chancellor decreed that the university "was not exempted from taxation for the one thousand acres, except to the extent of so many of the lots assessed as were occupied by the officers, trustees, professors, and agents of said university; that all other lots upon said one thousand acres are subject to taxation;" and he dismissed the injunction as to the one and made it perpetual as to the other. The Court gave Franklin County a decree for the amount of the taxes claimed to be due it upon the same basis.

The clause of exemption is plain and free of obscurity: "*One thousand acres of which, including buildings and other effects and property of said corporation, shall be exempt from taxation so long as said land belongs to said university.*"

It is also claimed and argued at bar that the exemption clause is void, because, under the Constitution adopted in 1834, and in force at the time the Legislature granted the charter, the Legislature had no power to grant exemptions from taxation to real property belonging to incorporated institutions of learning, by special charter. This ques-



tion has long since been settled by adjudications of this Court, and is not now an open question in this State. *Railroad Company v. Hicks*, 9 Bax., 442; *State v. Butler*, 2 Pickle, 614; *In Re Union & Planters' Bank*, 13 Lea, 407.

The power to make the exemption existing in the Legislature, it only remains to determine what is the extent, condition, and scope of the exemption. The contention of the State and county seems to be that this one thousand acres would be exempt from taxation so long as it remained as it was at the time the charter was granted: unproductive and standing in primitive forest, or was used in some way in connection with the object of the institution—viz., the training and education of young men.

Under the tenth section of this charter as quoted, the exemption is not made to depend upon use to which the land might be put, but relates to the title—"so long as such land belongs to said university." The attention of the Legislature was called to the fact that the State might at some time resume the right to tax this property, and it stipulated that this right should be resumed, not upon the condition that the university rented or leased the property, or made any other lawful use of it, but upon the condition the university parted with the title. The Legislature conceived, it is evident, that this property might be owned by the university, and that such ownership would not be an act outside of the purposes and objects of the

corporation, and made no limitation upon its use. It is the legal and moral duty of this corporation to so use the property, and all other assets belonging to it, as to best promote the ends and purposes for which it was created; and if by leasing it an income to the university can be created, and by this income it is enabled to extend its usefulness, it is the right and *duty* of this corporation to do so. By this means the property is made to contribute directly to the support of the institution, and subserve the great public purposes for which it was created, and which the Constitution of the State enjoins upon the Legislature at all times to foster and "cherish."

It would be hard to conceive to what uses, other than leasing or renting it to select persons, where business, trades, or occupations would be directly or remotely auxiliary to the necessities or convenience of the university and its inmates and officers, the corporation could put this one thousand acres of land which the Legislature authorized it to hold. The power to hold the ten thousand acres was to enable the corporation to keep "evil-minded persons" at a long distance from the university and from contact with the young men and youths attending it. The ownership of ten thousand acres, with the university located near the center of the tract, would make it the "master of the situation" as respects that class of persons whose presence or proximity was not desirable.

How could the university utilize the one thousand acres? It is not a manual labor school or an agricultural college, and, besides, the lands are not adapted to agriculture, being rough and mountainous. Certainly the Legislature did not intend that the land should remain forever of no positive utility to its owner. The only value of land consists in its adaptation and use. We cannot concur in the argument that the effort of this corporation to utilize these lands by leasing or renting it, and thus make it subservient to the chief end and purpose of the corporation, deprives it of exemption given by the State for the encouragement of such institution. *North-western University v. People*, 99 U. S., 309.

The decree of the Chancellor will be reversed, and the assessments made will be declared void, because the property is exempt from taxation for State or county purposes so long as it belongs to the university; and the injunction against A. J. Skidmore, Trustee, will be re-instated and made perpetual, and the bill of Franklin County dismissed. The defendants, A. J. Skidmore and the county of Franklin, and the securities of the latter, will pay all costs.

Judge Lurton did not sit in this case.

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State, *ex rel.*, v. Algood.

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STATE *ex rel.* v. ALGOOD.

(Nashville. December 31, 1888.)

87	163
110	613

87	163
116	747

1. CONSTITUTIONAL LAW. *Caption of amendatory statutes.*

The caption of an amendatory statute need not indicate the *particular character* of the proposed amendment, provided the title of the original act is therein set out, and the *purview* of the amendatory statute is germane to, and embraced within, the title thus recited.

Constitution construed: Art. II., § 17.

Case cited and approved: Hyman v. State, 87 Tenn., 109.

2. SAME. *Same. Case in judgment.*

An amendatory statute, transferring two counties from their respective judicial circuits to others, is constitutionally enacted under the caption, "An Act to amend an Act of the Extraordinary Session of 1885, passed June 11, and approved June 12, 1885, entitled 'An Act to divide the State of Tennessee into judicial circuits and chancery divisions, and provide for the administration of justice and equity in the Circuit, and Chancery, and other inferior Courts of this State, and to fix the time for holding said Chancery, Circuit, and other Courts.'"

Act construed: Acts 1887, Ch. 144.

(See 3 Lea, 340.)

3. SAME. *Passage of laws. Entries on Journals. Presumptions.*

Where an Act of the Legislature has been signed by the respective Speakers of both Houses in open session, and that fact noted on the Journals, and has been approved by the Governor, every reasonable presumption and inference will be made in favor of the regularity of its passage, and it will be upheld unless the Journals affirmatively show that it was defeated.

Constitution construed: Art. II., § 18.

Cases cited and approved: State v. McConnell, 3 Lea, 333; Hays v. State (oral opinion).

(See also 6 Lea, 549; 4 Lea, 611.)

Case cited and distinguished: Brewer v. Huntingdon, 86 Tenn., 732.

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State, *ex rel.*, v. Algood.

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4. SAME. *Same. Same. Case in judgment.*

Journals showed Bill passed by Senate and transmitted to House, where it was passed with an amendment. Amended Bill was returned to Senate, where it was rejected. Motions to reconsider were made, but Journal was silent as to any disposition of them. Subsequently the amended Bill was signed by the Speakers in open session, and that fact noted on the Journals. It was also approved by the Governor, and appeared in the printed Acts.

*Held:* The Act is valid. The presumption obtains that the motion to reconsider prevailed.

5. SAME. *Same. Call of "ayes and noes." Not required, when.*

The constitutional requirement that "the ayes and noes shall be taken in each House upon the final passage of every bill of a general character" has no application to an Act changing two counties from their respective judicial circuits to others, and fixing the time of holding courts therein and in one other county. Such Act is of a *local*, not "of a *general character*."

Constitution construed: Art. II., § 21.

Act construed: Acts 1887, Ch. 144.

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FROM WHITE.

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Appeal from Chancery Court of White County.  
T. W. WADE, Sp. Ch.

MURRAY & SPURLOCK and F. M. SMITH for Relator.

SNODGRASS & SMITH for Algood.

LURTON J. The relator was elected District Attorney for the Sixth Judicial Circuit at the general

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election of August, 1886. White County, which, at the date of his election, was one of the counties composing this circuit, has, by the act of March 19, 1887, been taken out of the Sixth and placed in the Fifth Circuit, of which Defendant Algood is the District Attorney. This bill is filed for the purpose of determining the validity of the act by which this change has been made. The defendant, Algood, demurred to the bill. The demurrer was overruled, and defendant, by permission of the Chancellor, has appealed from the decree overruling the demurrer.

The first objection made by the bill to the validity of the act changing White from the one circuit to the other is that the title of the act does not indicate the character of the amendment of the existing laws, and that it is therefore void, under Section 17 of Article II. of the State Constitution, which declares that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

The title of the act in question is as follows: "An Act to amend an Act of the Extraordinary Session of 1885, passed June 11 and approved June 12, 1885, entitled 'An Act to divide the State of Tennessee into judicial circuits and chancery divisions, and provide for the administration of justice and equity in the circuit and chancery and other inferior courts of this State, and to fix the time for holding the terms of said chancery, circuit, and other courts.'"

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State, *ex rel.*, v. Algood.

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The criticism is that this title does not indicate the character of the proposed amendment. This is not necessary if, in fact, the amendment is germane to the original act and is embraced within the title of the original or amended act. In such case, the title of the original act being made a part of the title of the amendatory act, the particulars of the amendment need not be shown by the title. In the case of *Hyman v. State*, decided at Knoxville, September Term, 1888, and reported, we, upon full consideration, held "that it is not important that the *title* of an amendatory act shall do more than recite the title or substance of an act amended, provided the amendment is germane to the subject of the original act and is embraced within the title of the original act."

The amendment is undoubtedly germane to the subject of the original act, as indicated by its title. There is nothing in this objection. The title of the amendatory act is sufficient.

It is next urged that this act was never, in fact, passed by the General Assembly in the manner prescribed by the Constitution. It appears from the Journal of the Senate that the bill, as originally introduced, was a Senate bill, and that it passed the Senate on three several readings, and was then transmitted to the House. The House Journal shows it to have passed its first and second readings as Senate Bill No. 262, and that it was then referred to a committee, who reported it back, and that "by unanimous consent Senate Bill

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No. 262, To fix the time of holding the courts in the Fourth Chancery Division, was taken up. The amendment offered by Mr. Hill was adopted, and the bill passed third reading without call of the roll." The amended bill was returned to the Senate, and the Senate Journal shows that the amendment was non-concurred in, on a call of the ayes and noes, by a vote of eleven ayes and eleven noes, and that on the same day a motion to reconsider this vote was entered. It further appears that on a subsequent day a second motion to reconsider this adverse vote was entered. The Journal is silent as to the ultimate disposition of these motions to reconsider, but it does recite that upon a day subsequent to both of these motions the Speaker of the Senate, in open session, announced that he had signed this bill. Subsequently the act was approved by the Governor, and it is found among the published official Acts of the Legislature. The complainant insists that, from the Journal of the Senate as above recited, it is affirmatively shown that this Senate Bill No. 262 never did pass the Senate after it had been amended by the House, and that therefore the act is void.

In the case of *Brewer v. Mayor of Huntingdon*, 2 Pickle, 737, we held that where it affirmatively appeared from the Journals of the Legislature that an act had not been passed in the manner required by the Constitution, that the presumption arising from the fact that the Journal showed that the bill had been signed by the Speakers in open



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State, *ex rel.*, *v.* Algood.

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session would not overcome the affirmative proof from the Journal that, in fact, the bill had been defeated. The case under consideration differs from the case just cited in this: That the same Journal which records the defeat of the amended bill shows a motion to reconsider this adverse vote. Before the bill could be finally disposed of it became necessary to dispose of this motion to reconsider. The Journal does not, therefore, show affirmatively that this bill was defeated, because it is silent as to the ultimate disposition of the motion to reconsider. Shall we presume that this motion to reconsider was never called up, or that it failed upon being called up? or shall we, in favor of the validity of the law, presume that there was a reconsideration, and that the bill ultimately received the vote necessary to its passage? We see from the Journal that subsequently the Speaker of the Senate, in open session, announced that he had signed this bill; and this solemn official act is noted upon the Journal, as required by the Constitution. What presumption arises from this evidence of the passage of the bill? We think the rule well settled that where the Journal does not affirmatively show the defeat of the bill, every reasonable presumption and inference will be indulged in favor of the regularity of the passage of an act subsequently signed in open session by the Speaker. This is the rule as announced by this Court in the case of *State v. McConnell*, 3 Lea, 333, and as followed by us in the case of *Hays v. State*, decided at

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Nashville in 1887, which case is referred to by Judge Snodgrass in announcing the opinion of the Court in the case of *Brewer v. Huntingdon*.

The Journal does not show affirmatively that this bill did not pass. The motion to reconsider, being duly entered, postponed the final fate of the bill. We know, as a matter of history and common political experience, that it is not unusual for a bill to be defeated and the adverse vote subsequently reconsidered, and the bill finally passed. The Constitution requires that after a bill has passed three readings in each House, "it shall be signed by the respective Speakers in open session, the fact of such signing to be noted on the Journals." The fact that, after an adverse vote, a motion to reconsider was entered, and that the Journal does not show any disposition of this motion, and that subsequently this bill was signed in open session by the Speaker of the Senate, as shown by the Journal, authorizes us to presume that the failure of the Journal to show the final passage of this bill is due to a clerical omission. This is, under the law applicable, the legitimate construction to be placed upon the whole record.

The next and last objection made to the validity of this act is that the Journal of the House shows affirmatively that this bill passed its third reading in the House without a call of the ayes and noes. This objection is rested upon Article II., Section 21, of the Constitution, which prescribes that "the ayes and noes shall be taken in each House upon

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State, *ex rel.*, v. Algood.

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the final passage of every bill of a general character and bills making appropriations of public moneys; and the ayes and noes of the members on any question shall, at the request of any five of them, be entered on the Journal."

Is this such a bill as requires the ayes and noes to be taken? This depends upon whether it is a bill making an appropriation of public moneys or a bill "*of a general character*" within the meaning of the Constitution. It is clearly not an appropriation bill. The very able counsel who have argued this cause for complainant insist that every law which is a public law is a bill of a general character. Any number of authorities have been cited to show that bills chartering banks and municipal corporations are public laws, and not private acts. This is conceded, but this is not the question. The Legislature is, by another provision of the Constitution, prohibited from passing any private or special acts. All laws must be general in the sense that they must apply to all alike. But if the framers of the Constitution used the phrase "laws of a general character" in contradistinction to private or special laws, then why was it necessary to add: "And laws making an appropriation of public moneys?" The greater would have included the less. Appropriation bills are not private or special laws. We think the phrase "laws of a general character" is used to distinguish general legislation—legislation in which the whole body of the people have, or may have, an interest—from

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State, *ex rel.*, v. Algood.

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legislation of a purely *local* character. Laws may be public in their objects and either general or local in their application. Thus, a law creating a new county, or changing a county line, or moving a county site, or creating a municipal corporation, would be public laws; and yet they would be local and not general in their application. They would not be laws of a general character, but laws of local application.

The act in question changed two counties from one to another circuit, and fixed the terms for the courts of one or two others. Such a law is not a "law of a general character," but a law limited and local in its application. The constitutional provision relied upon was not applicable to such legislation.

It follows that the Act of 1887, changing White County from the Sixth to the Fifth Circuit, was constitutionally enacted, and that Defendant Algood is the lawful District Attorney for that county.

The decree of the Chancellor will be reversed, the demurrer sustained, and the bill dismissed at cost of the relator, Whitson.

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Alvis v. Oglesby.

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3pi 172  
4pi 579

ALVIS v. OGLESBY.

(Nashville. January 1, 1889.)

1. STATUTE OF LIMITATIONS. *Distributee's suit against personal representative barred by ten years' statute.*

Suit, either at law or in equity, by a distributee against a personal representative, for an accounting, a devastavit, or distributive share, whether brought technically on his bond or otherwise, is barred (saving disabilities) under § 2776 of Code of 1858, unless it is commenced within ten years "after the course of action has accrued."

Code cited: §§ 3153, 3466, 3473 (M. & V.); §§ 2312, 2769, 2776 (T. & S.).

Cases cited and approved: 3 Yer., 231; 5 Hum., 291; 6 Lea., 471; 7 Johns Ch.——

Cited and overruled: Taylor v. Walker, 1 Heis., 740; Carr v. Lowe, 7 Heis., 98.

Cited as showing state of the law prior to Code of 1858: 3 Hay., 221; 4 Hay., 134; 8 Yer., 145; 3 Sneed, 157; 6 Hum., 446.

2. SAME. *Distributee's right of action accrues, when.*

Distributee's right of action against the personal representative accrues, as to assets then in the representative's hands, at the time he is required by law to make distribution, and then the statute begins to run.

3. SAME. *Disabilities. Burden of proof.*

The burden is on the party claiming the benefit of a disability to show himself within the saving of the statute, which otherwise bars his action.

Cases cited and approved: Shropshire v. Shropshire, 7 Yer., 165; McClung v. Sneed, 3 Head, 219; Chaney v. Moore, 1 Cold., 48.

4. SAME. *Same. Successive or Cumulative.*

Disabilities occurring after right of action has accrued cannot be added to pre-existing disabilities so as to save the bar of the statute of limitations.

(See Code, § 2759 (T. S.), and § 3453 (M. & V.), and notes.)

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5. SAME. *Guardian barred, ward not.*

Though guardian's suit is barred, the ward may maintain suit for his distributive share if brought within saving of statute after his majority.

Case cited and approved: *Henley v. Robb*, 86 Tenn., 474.

6. ADMINISTRATION. *Accounting. Surcharging and falsifying settlements. Burden of proof.*

Administrator's settlements, made in County Court, are to be taken as *prima facie* correct, in a proceeding brought to surcharge and falsify them.

Therefore, an order for an account, made in such proceeding, is erroneous, which, without proof showing errors, disregards such settlements, and directs an account *de novo*, taking the inventory and list of sales as basis for charges against the administrator, and requiring of him independent proof of the credits allowed in his settlements.

The settlements are, in such case, the proper basis for the account.

Code cited: § 3146 (M. & V.); § 2305 (T. & S.).

(See also § 4535 (M. & V.); § 3786 (T. & S.); 14 Lea, 555; 15 Lea, 627; 86 Tenn., 326, 474.)

7. SAME. *Same. Same. Payment of barred debts.*

Where an administrator has been allowed, in his County Court settlements, credit for debts paid by him after lapse of the time within which he could be sued, it will be presumed, in the absence of proof to the contrary, in a proceeding to charge him for *devastavit*, that the delay of creditors was at the administrator's request, and that the debts were not barred.

The same strictness of proof is not required to exonerate the administrator, in such case, as is required of the creditor seeking to recover his debt.

Case cited and approved: *Puckett v. Jones*, 2 Hum., 568.

8. SAME. *Same. Compound interest chargeable to administrator, when.*

Nothing but very culpable conduct will justify charging an administrator with compound interest in stating his accounts.

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9. SAME. *Same. Interest on credits allowed.*

Where an administrator is charged interest upon debits in stating his account, he should be allowed interest upon his credits. His disbursements should be credited upon the principle of partial payments.

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FROM MACON.

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Appeal from Chancery Court of Macon County.  
W. W. WADE, Ch.

HEAD & WOOTEN and JOHN S. McMURRY for  
complainants.

S. F. WILSON, J. J. TURNER, J. L. ROARK, and  
T. C. MULLIGAN for Respondents.

LURTON, J. The complainants are the distributees of James Kerley, who died intestate in 1859. They charge that Elisha Oglesby qualified as administrator upon his estate in July, 1859, and that he filed an inventory of the effects of the decedent and a report of sales of personalty during the year following, and that in 1869 he made a partial settlement in the County Court, but that he subsequently died without completing the administration by a final settlement. This bill is filed for the purpose of surcharging and falsifying the settlement made, and to recover their several distributive shares.

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The defendants, who are the executors of the deceased administrator, deny all charges of waste and devastavit, assert payment by their testator of the assets of the estate in due course of administration, set up and plead the settlement of 1869, and plead and rely upon the several statutory limitations, including the ten-year bar contained in § 2776 of the Code. The bill was filed June 5, 1881, twenty-two years after administration granted, and twelve years after the County Court settlement which they seek to falsify.

After much proof had been taken the Chancellor, upon the pleadings and proof, decreed an account, and settled the principles upon which it should be taken. In this decree he ruled "that Oglesby's estate is not protected in this cause by any statute of limitations, for the reason that Oglesby, as administrator of Kerley, was an express trustee, and the estate had never been settled." This defense of the statute of limitations presents the first and most important question which is presented by the assignment of errors.

As far back as 1817 it was decided by this Court that the statute of limitations, as it then existed, did not bar the suit of a distributee. *Pinkerton v. Walker*, 3 Hay., 221. In *Cartright v. Cartright*, 4 Hay., 134, and *McDonald v. McDonald*, 8 Yerg., 145, the same rule was repeated, and applied to the suit of a legatee. These decisions were followed in several other reported cases, including that of *Lafferty v. Turley*, 3 Sneed, 157.



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The opinions in this line of cases were rested upon the propositions:

*First*—That an administrator, by operation of his appointment by the Court having jurisdiction, and an executor, by reason of the will under which he was nominated, were express and not implied trustees.

*Second*—That the trusts incident to such an office were trusts cognizable alone in courts of equity, there being then no remedy at law by which a distributee could recover a distributive share or a legatee his legacy.

*Third*—That the statutes of limitation, as they then were, applied to the *forms* of action and not to the *cause* of action; and, as bills in equity were not expressly mentioned, that therefore, where the cause of action was a trust cognizable in equity alone, the statute did not apply to suits concerning such trusts.

Upon these premises these decisions were logical, and in accord with the decisions in the courts of Great Britain. It was never held in these cases, or any other made by this Court, that the statutes of limitation were not as applicable in equity as at law, when there was any remedy at law, even in cases of express trusts. Said Chief Justice Catron:

“Courts of equity, equally with courts of law, are bound by the statutes of limitation in all the varieties of bailments—loans, pawns, deposits, etc.—although express trusts, where there are convenient

remedies at law or by bill in equity." 3 Yerg., 231. Judge Green, that very eminent master of the principles of equity, in delivering the opinion of the Court in *Haynie v. Hall's Executor*, said:

"The statute of limitations prescribes that certain forms of action shall be barred within the time limited, and, therefore, in its terms it does not apply to courts of equity; but the courts of chancery, both of Great Britain and of this country, have uniformly held that in cases where any remedy exists at law, if a court of chancery gains jurisdiction of a cause, the time fixed in the statute as a bar to the action at law will also be a bar to a bill in chancery." 5 Hum., 291.

The sound and well-settled rule in courts of equity is that the statutes of limitation are applicable in every case in equity, when the trust is not a technical one, of which courts of equity alone take cognizance. The doctrine, as stated by Chancellor Kent in *Kane v. Bloodgood*, 7 Johns. Ch. Rep., —, is "that the trusts intended by the courts of equity not to be reached or affected by the statutes of limitation are those technical and continuing trusts, which are not cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this Court." See also *Peebles v. Greene*, 6 Lea, 471, where Judge McFarland clearly discusses this question.

Down to the enactment of the Code in 1858, there was no remedy at law against administrators in behalf of a distributee or legatee for the re-

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covery of a distributive share or a legacy. The cases already referred to so expressly decide. The act of 1762, which was the only statutory remedy given a legatee or distributee, provided that the suit should be brought by petition in the Chancery Court. Statutes of Nicholson & Caruthers, 251. That there was no remedy in the Circuit Court was expressly decided in *Dougherty v. Maxwell*, 6 Hum., 446. So continued the law until the Code, when, by § 2312, jurisdiction was given the County and Circuit Courts, concurrently with the Chancery Court, to entertain the suit of a distributee or legatee "for the payment of his distributive share or legacy." There is, therefore, since the Code, a remedy at law for the recovery of a distributive share or legacy. So, by the Code the statutes of limitation operate upon the *cause* of action, and not upon the *form*.

Another and more important change in the law, as it existed at the time of the decisions referred to, was made by § 2776, which originated with the Code. This section contains the statute of limitation relied upon by the defendants in this cause, and it reads as follows:

"Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments and decrees of courts of record of this or any other State or Government, and all other cases not expressly provided for, within ten years after cause of action accrued."

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By the preceding section actions against the sureties on such bonds are barred in six years. The bond which an administrator gives covers every default in his duty as administrator. For failing to account, for a devastavit, or for failing to distribute as required by law, he may be sued upon his bond, and such suit will now lie either in law or equity. Complainants' counsel very earnestly insist that this is not a suit against the administrator upon his bond, and that therefore it is not such an action as is contemplated by the statute quoted. If it be conceded, for the sake of argument, that this is not a technical action upon the bond, then would complainants escape the operation of the statute? Since the line of decisions holding such a suit as this not to be within the statutes, the Legislature has so changed the statute law of the State, that, as we have seen already, there is now a remedy at law for the recovery of a distributive share. They have also so changed the statutes of limitation that they now operate upon the *cause* and not the *form* of action. These legislative changes go to the very basis upon which the decisions of this Court had been planted. The very ground upon which this Court held that the trust of an administration was not within the intent of the statutes of limitation has, by this legislation, been overthrown, and such suits thereby brought distinctly within the rule which makes applicable the statute of limitations in equity as in law, where there is a remedy at law concurrent

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with chancery. But, more significant still is the fact that by the Code an action against the bond of an administrator is expressly barred in ten years. In view of this legislation, are we authorized to make a distinction between an action on the bond and one against the administrator personally for a devastavit, which is at last but a breach of a legal duty embraced within the terms of the bond? It would be a most extraordinary thing if the law were as insisted, and that a suit on the bond could be met and defeated by a plea of this statute; while if the litigant were wiser, and sued the administrator personally for a breach of the very duties covered by the bond, he would escape the operation of the statute. This would be to construe the statute as operating upon the form of the action rather than upon the cause. But the section under consideration is not limited, as implied by the insistence of counsel for complainants. It does not stop with barring suit upon the bond named therein; but, to cover all contingencies, the pregnant words are added: "*And all other cases not expressly provided for, within ten years after the cause of action accrued.*" These words cannot be stricken from the statute. These words, taken in connection with the opening section of the article in which both are found—that "*all civil actions other than those for causes embraced in the foregoing articles, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided*"

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(Code, § 2769)—indicate a legislative purpose and intent to prescribe a bar for all suits, whether specifically mentioned or not.

No reason exists for any strained construction of this statute that such suits may be entertained after such delay. There is no more sanctity about the demand of a distributee than is found in a vast number of the engagements arising from implied trusts, bailments, deposits, contracts, and judgments. What reason is there that, after a delay of ten years after right of action accrued—a delay not superinduced by fraud and concealment, or accounted for by legal disability—an exception should exist in the law in favor of such a claim, when many equally as meritorious are barred in a much shorter time? This Court did not base any exception in favor of such a suit upon any superior merit in such a demand, but alone upon grounds which have since been removed by legislation.

From all of these considerations we are led to the conclusion that the suit of a distributee for an accounting, or for a devastavit, or to recover a distributive share, is barred, unless brought within ten years; and this bar is as applicable in equity as at law, and as applicable to suits against the administrator upon the personal trusts arising from his office as to a suit technically on his bond.

The two cases cited as decided since the Code—*Taylor v. Walker*, 1 Heis., 740, and *Carr v. Lowe's Executor*, 7 Heis., 98—did not involve the construction of the section here construed, and this statute

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was not called to the attention of the Court. They are not adjudications sustaining the position of complainants, in that the question here decided was not even considered by the Court. The right of action in favor of these complainants accrued, as to the assets then in the administrator's hands, at the time he was by law required to make distribution. Neither the pleadings or proof show the receipt of any assets by him within ten years next before the bringing of this suit.

Some of the complainants sue with their husbands as married women; but the bill is silent as to how long this disability has existed or when it begun. The proof is equally silent save as to Sarah, the wife of Wm. Hicks. She was born December, 1853, and was married in 1874. She was under the disability of infancy alone at the time the statute began to run, and the subsequent disability of coverture cannot be added to the original. She attained her majority in 1874, and is therefore barred. The burden is upon complainants to show that by reason of disabilities they are within the saving of the statute, which has otherwise barred their action. *Shropshire v. Shropshire*, 7 Yer., 165; *McClung v. Sneed*, 3 Head, 219; *Chaney v. Moore*, 1 Cold., 48.

The proof shows that Complainant R. L. W. Kerley, the youngest child of the decedent, was born February 11, 1858. He therefore reached his majority February 11, 1879. This suit was commenced in June, 1881. He has therefore filed his

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bill within the saving of the statute, which is three years after the removal of his disability. The fact that his guardian is barred is no answer to his suit, and the bill, in so far as it seeks to recover his individual share, is in time. *Henley v. Robb*, 2 Pickle, 474. The statute is a bar to all the other complainants, none of them having shown such disability as brings them within the saving of the statute.

The next assignment of error is that the Chancellor directed the Master, in stating an account with the administrator, to take as the basis of the account the inventory and account of sales, and to credit the account by such claims as were shown not to have been lost by neglect, and by such disbursements as were properly made. This was error, in that the settlement made in 1869 in the County Court should have been made the basis of the account. This settlement, though not final, was, so far as it went, *prima facie* evidence in favor of the administrator. Code, § 2305. Although the allegations of the bill were sufficient to authorize complainants to surcharge and falsify the account, yet, upon a reference, the burden was upon the complainants to show by proof the incorrectness of the account they sought to surcharge and falsify by their bill. This decree of reference cast the burden upon the administrator to sustain his former settlement. The statute casts it, in all such cases, upon the attacking party. The decree of reference was likewise erroneous in directing



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that the administrator should not be allowed credits for debts paid by him after lapse of the time within which he could be sued. If the debt was just, and the delay had been at the request of the administrator, then the payment would not be a devastavit. While the burden of proof is upon the administrator who pays a debt after the bar of the administrator's statute, yet, when it is sought to charge an administrator with a devastavit for paying a just debt after such bar, such strict proof will not be required to justify such payment as would be of a creditor in an action where he sought to recover on such a debt. We approve of what was said by this Court in *Puckett v. James*, 2 Hum., 568: That "if the executors felt that it was doubtful whether the creditor could recover, and knowing that the debt was a just one, and that they had induced him to delay by their request, it might be very proper for them to pay the debt. They would thus have avoided an expensive litigation, that might have resulted in a recovery of the debt at last, involving the estate in unnecessary costs, and themselves in dishonor."

The debts thus paid were allowed the administrator in his County Court settlement. The record is silent as to the circumstances under which they were delayed in payment, and equally so as to the showing made by the administrator, upon which he obtained these credits. Under these circumstances the settlement, after so great a lapse of time, ought not to be disturbed. The presumption

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Alvis v. Oglesby.

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arising from the settlement stands until overthrown; that the delay was at the request of the administrator.

The decree compounding interest against the administrator is erroneous upon the facts of this case. Nothing but very culpable conduct will justify the compounding of interest, and no such culpability exists as will authorize any such punishment upon the facts as they appear in this record.

The Master's report charged interest upon the entire sum with which the administrator was chargeable, but does not allow interest upon credits allowed him. This is gross error. His disbursements should have been credited on the principle of partial payments from the time they were made.

The bill will be dismissed as to all of the complainants save R. L. W. Kerley. All of the costs of this Court, and one-half the costs of the Chancery Court, will be paid by complainants, including R. L. W. Kerley, and the remainder will be paid by defendants, unless it should turn out that nothing is due the Complainant R. L. W. Kerley, in which event he will pay the remainder of the costs. The case will be remanded for an account to be taken upon the proof in the record, to ascertain the amount, if any thing, due to the complainant, R. L. W. Kerley, upon the principles here determined.

I do not concur as to the running of the statute of limitations in favor of the administrator as trustee of funds in his hands. SNODGRASS, J.

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Bright v. Moore.

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BRIGHT v. MOORE.

(Nashville. January 1, 1889.)

STATUTE OF LIMITATIONS. *Suspension of, as to suits against administrators.*

The statute of limitations of six years does not run against creditors of a decedent, either during the six months immediately after administration, or during the period, not exceeding six months, actually elapsing between the decedent's death and the granting of administration on his estate. Both periods must be excluded.

Code cited: §§ 3112, 3454 (M. & V.); §§ 2274, 2760 (T. & S.).

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FROM LINCOLN.

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Appeal in error from Circuit Court of Lincoln County. M. D. SMAILMAN, J.

JOHN M. BRIGHT for Bright.

HOLMAN & CARTER for Moore.

CALDWELL, J. On the fifth of January, 1881, W. C. Bright executed a promissory note to H. L. Moore for \$175, due twelve months after date. Bright died November 20, 1887, leaving the note unpaid. Letters of administration upon his estate were granted to Anna B. Bright January 24, 1888, and Moore brought this action against her

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Bright v. Moore.

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on the 26th of July, 1888, to collect said note. The suit was commenced before a Justice of the Peace, who rendered judgment for Moore. The administratrix appealed to the Circuit Court, where the Circuit Judge tried the case without the intervention of a jury, and pronounced judgment, as did the Justice of the Peace, in favor of Moore for the full amount of the note, with interest thereon. The administratrix appealed in error to this Court.

The only defense interposed in the Court below, and the only one relied upon here by the learned counsel of appellant, is the statute of limitations of six years.

Was the action barred?

From the dates already given, it is readily seen that six years, six months, and twenty-one days elapsed between the maturity of the note and the commencement of this action.

It is conceded that the six months immediately following the grant of letters of administration, during which suit would not lie against the administratrix, must be excluded in the computation of the time necessary to complete the bar of the statute in her favor; but, after the exclusion of that six months, there still remains a period of six years and twenty-one days between the date of the maturity of the note and the bringing of this suit.

The insistence is that the statute of limitations was running during the whole of the latter period,

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Bright v. Moore.

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and that the bar is inevitable. This contention is met by a provision of the law which makes a further exclusion of two months and four days—the time between the death of Bright on the 20th of November, 1887, and the qualification of his administratrix on the 24th of January, 1888.

Section 3454 of the Code (by M. & V.) is in the following language, viz.:

“The time between the death of a person and the grant of letters testamentary or of administration on his estate, not exceeding six months, and the six months within which a personal representative is exempt from suit, is not to be taken as a part of the time limited for commencing actions which lie against the personal representative.”

This statute, in the clearest terms, excludes from the time to be computed under the statute of limitations not only the first six months after the grant of letters testamentary or of administration, but also *the time elapsing between the death of the debtor and the grant of such letters*; provided only that the latter period excluded shall not exceed six months.

In other words, the statute of limitations does not run against the creditors of a dead man's estate from the date of his death until the expiration of six months after the qualification of an executor or administrator on his estate, unless the whole period should exceed twelve months. In no event will the cessation of the statute's operation be for a longer time than one year. It will be for less

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Bright v. Moore.

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than one year when the time between the death of the debtor and the qualification of his personal representative is less than six months.

The first six months after the qualification of the personal representative is excluded because no suit can be maintained against him during that time (Code, M. & V., § 3112); and the period between the death and the qualification, not to exceed six months, is excluded because there is no one whom the creditor may sue during that time.

Applying this construction of § 3454 of the Code to the facts of this case, and making proper exclusions, it is easily demonstrated that the six-year statute of limitations had not run its full time, and that the bar was not complete when this suit was brought.

Let the judgment be affirmed with costs.

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Telegraph Company v. Munford.

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TELEGRAPH COMPANY v. MUNFORD, Ex'rx, Etc.

(Nashville. January 3, 1889.)

1. TELEGRAPH COMPANIES. *Contract against liability for negligence of connecting line valid.*

A telegraph company, that receives a message to be sent over its own line, and becomes the sender's agent to forward it over an independent connecting line, may, by contract with the sender, protect itself from all liability for negligence of the latter company. Such contract is legal and valid.

Cases cited and approved: Marr v. Telegraph Co., 85 Tenn., 536; Brumley v. Railroad, 5 Lea, 401.

2. SAME. *Negligence. Proximate Cause.*

Negligence of a telegraph company, whereby the address of a message is changed in transmitting it to a connecting line, is not the proximate cause of loss occasioned by delay in its delivery; where it appears that the connecting company received the message promptly, and was not misled by the change of address, but negligently delayed delivery solely from other causes.

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FROM WARREN.

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Appeal in error from Circuit Court of Warren County. M. D. SMALLMAN, J.

J. W. BONNER for Telegraph Company.

MURRAY & SPURLOCK for Munford.

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Telegraph Company v. Munford.

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LURTON, J: This is an action brought by E. W. Munford, the testator of defendant in error, in his life-time, to recover damages alleged to have been sustained by delay in the transmission of a telegram. E. W. Munford, on the 11th of April, 1887, delivered to the agent of the plaintiff in error, at its office in McMinnville, Tennessee, a telegram for transmission to Tampa, Florida, of which the following is a copy:

“McMINNVILLE, TENN., April 11, 1887.

“*Col. Sam. Tate, Tampa, Florida:*

“Proposition accepted. Your draft for one thousand will be honored.

“(Signed) E. W. MUNFORD.”

The line owned and operated by the Western Union Telegraph Company did not extend to Tampa, Florida, but terminated at Jacksonville, in that State. From Jacksonville to Tampa there was a telegraph line owned and operated by the South Florida Telegraph Company, and the message in question could only be transmitted to its destination by being sent over the line of the Western Union Telegraph Company to Jacksonville, and then transferred to the South Florida Company, by whom it would be sent to Tampa. Of this fact Mr. Munford was advised by the agent who received his message for transmission. The telegram was promptly forwarded, reaching Tampa early in the afternoon of the same day.



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Telegraph Company v. Munford.

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In transmission the address of the message was changed from Col. *Sam. Tate* to Col. *Wm. Tate*. This, it is agreed, occurred on the line of the plaintiff in error before it was transferred to the connecting company. The message was not delivered by the South Florida Company to Col. Tate until the 13th, it having been received at Tampa on the 11th. Plaintiff below alleged that by this delay he sustained damages amounting to five hundred dollars.

In the view we take of the case it is only necessary to consider one of the defenses presented by the pleas of the plaintiff in error, and that, in substance, is that the *delay* in the delivery of the message was not occasioned by the error in transmitting the address, but resulted alone from the negligence of the agent of the South Florida Company.

The facts concerning this delay, as we find them to be from the transcript, are these: The agent of the South Florida Company at Tampa personally knew Col. *Sam. Tate*. He states that he knew of no such person as Col. *Wm. Tate*, and that when he received this message he believed it to be intended for Col. *Sam. Tate*; that he instructed the messenger whose duty it was to make personal delivery of messages to inquire and learn if there was a Col. *Wm. Tate* in Tampa, and if he could hear of no such person to take the message to Col. *Sam. Tate*. The messenger thus instructed says he made inquiry, and, hearing of no *Wm.*

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Telegraph Company v. Munford.

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Tate, undertook to deliver the message to Col. Sam. Tate; that he took it to the office of S. A. Jones, where both he and the agent say they had been requested by Mr. Jones to leave messages for Col. Tate. The messenger states, upon inquiry for Col. Tate a clerk in the office informed him that Col. Tate was then at Clear Water Harbor. This information being communicated to the agent of the telegraph company, he, on the same day, instead of making further inquiry for Col. Tate, mailed the message addressed to Col. Sam. Tate at Clear Water Harbor, Florida. The fact, as shown by the proof, is, that Col. Tate was in Tampa on the 11th, and had been there for some days, and that he had never authorized delivery of messages for him at the office of Mr. Jones, but that, on the contrary, he was accustomed to receive his messages at his usual boarding place, which was known at least to some of the telegraph company's messengers. Two days thereafter Col. Tate called at the telegraph company's office to inquire about another message, when he was handed a copy of the telegram which had been mailed to him at Clear Water Harbor.

If the message had been delivered to him on the day it was received and mailed to Clear Water Harbor, it is conceded that the damage alleged to have been sustained would not have occurred.

The facts, as above recited, are not disputed, and establish beyond controversy that the delay in

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Telegraph Company v. Munford.

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the delivery of the message was not in consequence of the error in transmission of the address, but was the result of the subsequent and independent negligence of the South Florida Telegraph Company. The damage alleged to have been sustained was the direct consequence of delay in delivery, for Col. Tate says that he should have had no doubt, upon seeing the message, that it was for him alone, and that he should have acted upon it. The damages to be recovered, whether the *gravamen* of the action be regarded as breach of contract or a technical tort, must be limited to such as are the natural and proximate result of the injury or wrong done.

This brings us to the consideration of the question as to whether the plaintiff in error is responsible for damages which resulted alone from the negligent delay in the delivery of this message by the agent of the South Florida Telegraph Company. The message was written upon one of the usual blanks furnished by the Western Union Company. One of the printed conditions contained on this blank reads as follows: "This company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination." Is this a valid limitation upon the liability of the company?

Telegraph companies are not common carriers, nor are they insurers, either of the accurate transmission or the sure and prompt delivery of mes-

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Telegraph Company v. Munford.

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sages. They are liable, however, for losses consequent upon their negligence. *Marr v. Western Union Telegraph Company*, 1 Pickle, 536.

Even common carriers are not responsible for losses occurring upon a connecting line unless there was a contract upon their part to be so responsible. That they may, by contract, limit their liability to defaults occurring upon their own lines is well settled. So the fact that two lines are connected, and for their mutual convenience collect freight for each other upon goods delivered for transmission over both lines, will not make the one responsible for losses occurring beyond its own line, unless it has contracted so to be. *Brumley v. Railroad*, 5 Lea, 401.

These principles applicable to common carriers seem to us to be alike applicable to telegraph companies. Mr. Gray, in his very valuable monograph upon Communication by Telegraph, in discussing this limitation found in the contract of the Western Union Company, and quoted above, says:

“Two entirely distinct provisions are embodied in this regulation. One provision is that the telegraph company, in consideration of receiving full prepayment for the delivery of a message at a place upon the line of another company, agrees to deliver the message to a connecting company, and, as the agent of the sender, to contract with that company for the further transmission of the message. This is an offer of special terms of contract.

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Telegraph Company v. Munford.

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A telegraph company is, it seems, under an obligation, by its ordinary contract, only upon receipt of its own charges to deliver the message to a connecting company. It is under no obligation by that contract to contract, as the agent of its employer, with the connecting company for the further transmission of the message, or to receive and account for the payment for such transmission. This provision in the regulation is unquestionably reasonable, and, with the assent of the employer of the company, constitutes a valid and mutually beneficial contract. \* \* \* \* \*

“The other provision embodied in this regulation is that the telegraph company limits its liability to losses occurring on its own lines. This has usually been treated as an offer of special terms. As such it constitutes, with the assent of the employer of the company, a valid contract. This provision is clearly just and reasonable. In the absence of a partnership relation between them, one telegraph company has no more authority over another telegraph company than an individual has. A telegraph company should be entitled, therefore, to contract specially with one who wishes to employ it that it shall not be liable for loss occasioned by the act of a connecting company; that that person shall seek relief, in case of a loss, directly of the company which causes and is under any circumstances finally liable for the loss.” Gray on Tel. Communication, Section 33.

That the Western Union and South Florida

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Telegraph Company v. Munford.

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Telegraph Companies were entirely distinct and independent corporations, and that no partnership relations existed between them, is admitted in the agreed statement of facts contained in the record. The case was tried by the Circuit Judge without the intervention of a jury, who, being of opinion that the error in transmission of address was the proximate cause of the damage sustained, gave judgment in favor of the plaintiff below.

This judgment is not supported by any material facts, and must be reversed, and judgment rendered here in favor of the Western Union Telegraph Company.

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Dyer v. Hutchins.

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DYER v. HUTCHINS.

(Nashville. January 5, 1889.)

ACTIONS. *Joinder of defendants.*

Where dogs belonging to different owners unite in depredations upon a flock of sheep, the owner of the sheep cannot maintain a *joint* action against the owners of the dogs for the damage done, but must sue each separately for the damage done by his own dog.

Act construed: Acts 1859-60, Ch. 45.

(Code, § 2192 (M. & V.); § 1681c (T. & S.).

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FROM DEKALB.

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Appeal in error from Circuit Court of DeKalb County. M. D. SMALLMAN, J.

W. C. Dyer sued J. C. Hutchins and J. S. Hutchins jointly, before a Justice of the Peace, for damage done to his sheep by their dogs. He recovered before the Justice and in the Circuit Court. Defendants appealed, and assigned as error that a joint action could not be maintained.

The evidence shows that defendants did not own the dogs jointly that committed the depredations upon plaintiff's sheep, but that J. S. Hutchins owned one dog and J. C. Hutchins two, and that the three dogs joined in chasing plaintiff's

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Dyer v. Hutchins.

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sheep, and would have caught them if they had not been stopped. The plaintiff says his sheep have become "wild and foolish" in consequence of this rude treatment, and that eight of them have gone astray, and will not return to the fold. He states that two of his flock "came home with a little of their tails off." No other damage was shown.

WEBB & AVANT for Dyer.

T. W. WADE for Hutchins.

TURNER, C. J. The Act of 1859-60, Chapter 45, Section 1, is: "Where any dog or dogs shall kill, or in any manner damage, any sheep in this State, the owner of such dog shall be liable, upon an action for damages, to the owner of such sheep for the worth of such sheep, if killed, or for the amount of injury or damage committed upon the same by such dog."

In this case the injury was done by two dogs belonging to different persons, who were sued jointly.

There is nothing in the statute making the wrong the joint wrong of the respective owners. Each is responsible only for the act of his own animal, and must be sued separately therefor.

The judgment must be reversed, and the suit dismissed.



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 DAVIS v. DAVIS.
 

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## DAVIS v. DAVIS.

(Nashville. January 8, 1889.)

1. COUNTY COURT. *Jurisdiction. Sale of decedents' lands to pay debts.*

County Courts have jurisdiction of proceedings to sell decedents' lands to pay debts, and, as incident thereto, to hear proof and adjudicate the claims of creditors presented in such proceedings, although there has been no suggestion of insolvency of the estate.

Code cited: §§ 3105, 3106, 4980, 5004, 5005 (M. & V.); §§ 2267, 2268, 4201, 4232, 4233 (T. & S.).

Cases cited and approved: *Burgner v. Burgner*, 11 Heis., 732; *Kindell v. Titus*, 9 Heis., 727; *Norville v. Coble*, 1 Lea, 467; *Connell v. Walker*, 6 Lea, 712.

2. SLANDER. *Charge of Perjury. Oath.*

Action for slander can be maintained by a witness who has been wrongfully accused of perjury in his deposition given in such proceedings.

The oath administered to such witness is legal and binding.

Cases cited and distinguished: *Jones v. Morris*, 11 Hum., 216; 10 Bush., 758.

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 FROM DEKALB.
 

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Appeal in error from Circuit Court of DeKalb County. M. D. SMALLMAN, J.

R. C. NESMITH and WEBB & AVANT for plaintiff.

J. B. ROBINSON and B. G. ADCOCK for defendant.

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Davis v. Davis.

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CALDWELL, J. This is an action for slander, brought in the Circuit Court of DeKalb County by J. P. Davis against T. J. Davis.

It is averred in the declaration that the defendant falsely and maliciously charged the plaintiff with having committed the crime of perjury while testifying, in his deposition as witness, to a certain material matter, about which he had been sworn, in the cause of *T. J. Davis, adm'r, etc., et al. v. Coleman Davis et al.*, then pending in the County Court of DeKalb County.

The defendant put in a plea of *not guilty*.

On the issue thus made the parties went to trial before Court and jury. Verdict and judgment were for the defendant, and plaintiff appealed in error.

At the trial below the plaintiff examined the Clerk of the County Court, who testified that he qualified plaintiff to the deposition referred to in the declaration. Then the deposition itself and other portions of the record in the County Court cause were introduced as evidence in behalf of the plaintiff.

From that record it appeared that T. J. Davis, as administrator of Solomon Davis, deceased, and other persons filed their bill in the County Court of DeKalb County to sell land belonging to the estate of said decedent for the payment of debts against his estate and for distribution of the residue of the proceeds of the land among his heirs, the complainants and defendants in the bill;

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Davis v. Davis.

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that in due time that cause was referred to the Clerk for a report as to the amount of personal assets received, disbursed, and still in the hands of the administrator; as to *bona fide* debts against the estate theretofore paid by the administrator and those yet unpaid; and as to amount and value of real estate, and the necessity of selling same for payment of debts or for division of proceeds among the heirs.

It further appeared from that record that J. P. Davis, the plaintiff in the present action, claimed to be a creditor of that estate to the extent of \$780, due by account for services rendered the decedent; that he filed his claim in that cause, and, pending the reference to the Clerk, was sworn by the Clerk, and gave his deposition to establish the justice of his said demand; and that his wife and daughter also appeared before the Clerk and gave their depositions for the same purpose.

After the examination of that Clerk and the introduction of the County Court record as evidence in the present case, as has already been stated, the plaintiff was placed upon the witness stand, and by his counsel asked to state whether or not he was sworn and testified as a witness in the said cause of *Davis et al. v. Davis et al.*, and whether or not the defendant in the present case had charged him with having committed perjury in his testimony, as contained in his deposition in that cause.

The defendant objected, and the Court refused

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Davis v. Davis.

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to permit the plaintiff to answer the question. The ground of the objection, as stated in the bill of exceptions, was "because neither the County Court nor its Clerk had any power or jurisdiction to hear, try, or determine said matter of account in controversy between J. P. Davis and the administrator, and because it was immaterial, and said Clerk could not legally administer said oath to the plaintiff."

The plaintiff's wife and daughter were each offered by him to prove that they heard the defendant make the charge against him (the plaintiff), but the Court refused to let them answer, upon the same objection by defendant.

The action of the Trial Judge in sustaining this objection and refusing to permit the witnesses to answer the questions is now assigned as error by appellant.

If it be true, as assumed in the first part of the objection, that the County Court had no jurisdiction of the matter of account in controversy, it would follow, as assumed in the latter part of the objection, that such matter of account and the deposition were immaterial in that proceeding, and that the Clerk was not authorized to administer the oath to the deponent. *Jones v. Marrs*, 11 Hum., 216; *Burkett v. McCarty*, 10 Bush, 758.

So that the paramount question, in this connection, is whether or not the County Court had jurisdiction of the matter about which J. P. Davis testified in his deposition. If such jurisdiction ex-

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Davis v. Davis.

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isted the testimony was material and the Clerk had authority to qualify deponent.

This record fails to state in what particular the Trial Judge deemed the County Court wanting in jurisdiction of the claim relative to which the plaintiff deposed. We infer, however, that he was of opinion that the County Court had jurisdiction to entertain a bill to sell land of a deceased person for the payment of debts, and to adjudicate disputed claims *only in cases of insolvency*, and that the jurisdiction failed in that case because *the insolvency* of the estate of Solomon Davis, deceased, *had not been suggested*.

Such is the position now taken by appellee's counsel, in argument at the bar, to sustain the action of the Court below.

The conclusion that the insolvency of the estate had not been suggested is fully justified by the record of the County Court proceedings. The bill did not allege such suggestion, but was framed as a bill in chancery to sell land to make assets for payment of debts under the Act of 1827, which did not require or contemplate a previous suggestion of insolvency.

By the plain letter of the Act the Chancery and Circuit Courts have jurisdiction of such a bill, and are authorized and required to adjudicate all claims presented against the estate of a decedent. Code (M. & V.), §§ 3105 and 3106.

And, by construction of that Act in connection with other provisions of the Code (§§ 5005, 5045,

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Davis v. Davis.

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4980, Subsec. 6), it is now well settled that the County Court has concurrent jurisdiction with the Chancery and Circuit Courts to sell land for the payment of debts, though the insolvency of the estate had not been formally suggested. *Burgner v. Burgner*, 11 Heis., 732; *Kindell v. Titus*, 9 Heis., 727; *Norville v. Coble*, 1 Lea, 467; *Connell v. Walker*, 6 Lea, 712.

Then it is certain that the County Court of DeKalb County had full jurisdiction of the matter about which the plaintiff gave his deposition; that the Clerk of that Court had ample authority to administer the oath to him, and that the testimony was material.

If that testimony be false the witness was guilty of legal perjury; and if true, the alleged charge that it was false is slanderous and actionable.

The action of the Court in rejecting the evidence offered by the plaintiff was erroneous. For that error the judgment is reversed, and the case remanded for a new trial. The appellee will pay the costs of appeal.

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Brakefield v. Anderson.

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## BRAKEFIELD v. ANDERSON.

(Nashville. January 12, 1889.)

SPECIFIC PERFORMANCE. *Parol Sales of land. Statute of frauds.*

A *parol contract* for sale of lands—being otherwise unexceptionable—will be specifically enforced by a court of equity where, in proper pleadings seeking its specific performance, the parties have fully set out and agreed upon the terms of the contract, and neither has relied upon the statute of frauds. Refusal of specific performance, in such case, is error.

Code cited: § 2423, subsec. 4 (M. & V.); § 1758, subsec. 4 (T. & S.).

Cases cited and approved: *Jennings v. Bishop*, MS., Nashville, December Term, 1883; *Sneed v. Bradley*, 4 Sneed, 304; *Hudson v. King*; 2 Heis., 573; *Winters v. Elliott*, 1 Lea, 676; *Hays v. Worsham*, 9 Lea, 593.

Cited and distinguished: *Biggs v. Johnson*, MS., Jackson, April Term, 1876; *Shuder v. Newby*, 85 Tenn., 348.

Cited as showing nature of parol contracts of sale: 5 Hum., 130; 2 Sneed, 177; 1 Hum., 325; 5 Hum., 130; 2 Swan, 598; 2 Sneed, 175; 4 Sneed, 304; 1 Cold., 320; 2 Heis., 134, 681; 6 Heis., 455.

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FROM FRANKLIN.

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Appeal from the Chancery Court of Franklin County. W. S. BEARDEN, Ch.

MARKS & GREGORY and JOHN SIMMONS for Brakefield.

BRANNON & BANKS for Anderson.

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Brakefield v. Anderson.

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CALDWELL, J. In August, 1876, W. W. Brakefield bought of James Anderson thirty-seven and one-half acres of land in Franklin County, and went immediately into possession.

More than eight years thereafter, in November, 1884, Brakefield filed the original bill in this cause, setting out the contract, and alleging the payment of the purchase money and the refusal of Anderson to convey him the land, and praying for a specific performance of the contract, if that could be granted by the Court; and, if not, that he be allowed a recovery for the purchase money paid, and also for the value of improvements by him placed upon the land.

Anderson answered the bill, admitting the contract, but denying that the whole of the price had been paid. In his answer he further says:

“The trade was made in good faith by respondent, and he is able, ready, and willing to make complainant a warranty deed to said thirty-seven and one-half acres of land whenever complainant pays him the balance of the purchase money and the interest now due upon the same.”

The answer is then filed as a cross-bill, with a prayer that Anderson be allowed a decree against Brakefield for the balance of purchase money due, and that the land be sold for the satisfaction thereof.

Brakefield answered the cross-bill, insisting, as in the original bill, that he had paid all the purchase money for the land. .



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Brakefield v. Anderson.

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Upon these pleadings and proof that the contract had never been reduced to writing, the Chancellor, on his own motion, pronounced a decree rescinding the sale, and referring the cause to the Master for an account of purchase money paid, improvements, rents, and taxes.

In due time decree was made upon the report of the Master and exceptions thereto.

Brakefield has appealed.

The decree rescinding the sale is manifestly erroneous, and will be reversed.

The learned Chancellor must have been of the opinion that the contract of sale was absolutely void for all purposes, because resting in parol, and that a Court should not, therefore, in any event, assist in its enforcement.

This is a mistaken view of the law. It is true that the statute provides that no action shall be brought upon any contract for the sale of land unless the contract, or some memorandum thereof, shall be reduced to writing and signed by the vendor, or some other person by him thereunto lawfully authorized. Code (M. & V.), § 2423, Subsec. 4.

And it is likewise true, under the decisions of this Court, and contrary to those of the English Courts, that part performance of a parol contract for the sale of land, by delivery of possession on the one side, and payment of a portion or the whole of the purchase money on the other side, will not render the contract binding or take it

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Brakefield v. Anderson.

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out of the operation of the statute. *Patton v. McClure*, M. & Y., 333; 5 Hum., 130; 2 Sneed, 177; *Jennings v. Bishop*, MS. Opinion, Nashville, December, 1883.

But the statute is operative to defeat a verbal contract only when interposed by one of the parties. Such a contract may be enforced by the consent and upon the application of both parties. So long as it is recognized, affirmed, and adhered to by vendor and vendee it cannot be annulled by the voluntary action of the Courts.

The sounder view is that a verbal sale of land is not void *ab initio*, but only voidable at the election of either party, and not enforceable by one against the will of the other who abandons or repudiates it.

The decisions of this Court have not been altogether harmonious upon this subject. In several of them such sales have been characterized as void (*Pipkin v. James*, 1 Hum., 325; *Crippen v. Bearden*, 5 Hum., 130; *Hurst v. Means*, 2 Swan, 598; *Sheid v. Stamps*, 2 Sneed, 175), and in many others they have been held to be voidable merely. *Sneed v. Bradley*, 4 Sneed, 304; *Hilton v. Duncan*, 1 Cold., 320; *Roberts v. Francis*, 2 Heis., 134; *Hamilton v. Gilbert*, 2 Heis., 681; *Masson v. Swan*, 6 Heis., 455.

In some of the cases of the former class no distinction was taken, or was necessary to be taken, between the terms void and voidable; but the distinction, suggested by the words themselves, was expressly made in the cases of the latter class,

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rakefield v. Anderson.

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wherein parol sales were held to be *voidable* only, and not *void*.

The later case of *Biggs v. Johnston* was an action at law by the vendee, in possession, to recover from the vendor purchase money paid under an *insufficient* written contract for the sale of land. Johnston insisted that the action could not be maintained, because Biggs did not surrender possession of the land before commencing the suit. The majority of the Court held that an actual removal from the land by the vendee was not a prerequisite to his right of action, but that notice of his election to abandon the contract was sufficient to authorize his suit. In the discussion of that case the learned Judge who delivered the majority opinion said that the contract was "*void* in law, having no element of legal obligation enforceable against either party. *Biggs v. Johnston*, MS. Opinion, Jackson, April, 1876.

In the case of a bill by the vendee to rescind a verbal contract for the sale of land this Court said:

"There is no contest as to the question of the right to rescind such a contract by either party, or, rather, to treat it as *void* at their option, since the case of *Biggs v. Johnston*." *Winters v. Elliott*, 1 Lea, 676.

To the same effect is the language used and the decision made in the case of *Hays v. Worsham*, 9 Lea, 593.

But even these three cases concede, by implica-

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Brakefield v. Anderson.

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tion, at least, that the contract is binding upon the parties until one of them elects to rescind or abandon it. Whether this be true or not, it is very certain that no one of them undertook to decide, or could properly have decided under the facts therein disclosed, that the Courts were authorized to annul such a contract when both parties were insisting upon its execution.

Later still is the case of *Jennings v. Bishop*, wherein this Court, speaking through Judge Cooper, said:

"A parol contract for the sale of land is *not absolutely void*, for it may be specifically executed as against either party if he fails or refuses to rely upon the statute; and if the parties themselves choose to execute the contract, third parties cannot object." MS. Opinion, Nashville, December, 1883.

We follow this case, not only because it is the most recent utterance of this Court upon the subject treated, but also because we think it rests upon sounder reasons, and will better subserve the ends of justice than a contrary or different holding.

The case of *Shuder v. Newby*, 1 Pickle, 348, is not in conflict with our holding here. Whether the contract in that case was *void* or *voidable* was treated as entirely immaterial. The Court there said:

"Whether the parol agreement to purchase land be regarded as absolutely void or only voidable

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cannot matter. *When the plaintiff elected to disaffirm the contract of sale it at once became void.*

\* \* \* The parol agreement never could have been enforced *against his consent.*"

Either party may repudiate the contract whenever he may choose to do so without incurring any liability for its breach; but, when one party seeks its enforcement through the Courts, the statute to be made avoidable to the other party must be by him relied upon as a defense.

"The doctrine is now well established that, upon a bill for the specific execution of such a contract, if the contract be fully set forth in the bill, and the defendant admits it in his answer, and submits to waive the statute of frauds, or, what is deemed equivalent to a waiver, does not insist upon the statute as a defense, a specific performance of the contract will be decreed." *Sneed v. Bradley*, 4 Sneed, 304; 2 Heis., 573.

As we have seen, Judge Cooper puts the same doctrine more briefly in these words: \* \* \*

"It [the parol contract] may be specifically executed as against either party if he fails or refuses to rely upon the statute." *Jennings v. Bishop*, MS.

In the case at bar neither party relies upon the statute. On the contrary, the vendee comes with his bill and seeks the execution of the contract; and the vendor not only does not interpose the statute as a defense to the vendee's action, but he brings his answer and cross-bill, and affirmatively

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asks the Court to enforce the contract in his behalf.

Both parties come with appropriate pleading and say they want their contract carried out. When this is done the reason of the statute—the prevention of fraud and perjury—ceases, and the Chancellor, instead of setting the contract aside, should decree its specific execution, the case being one in other respects (as this one is) justifying specific performance by a court of equity.

The proof shows a balance of twenty-seven dollars and fifty cents of the purchase price still unpaid. To this must be added eighteen dollars and twenty cents interest, making in all forty-five dollars and seventy cents. For this sum Anderson is entitled to a decree under his cross-bill; and unless payment thereof should be made in ninety days from this date the land will be sold. If, however, the said sum should be paid within that time, then Anderson will be required to make Brakefield an absolute deed, with the usual covenants.

The costs of this Court and the Court below will be equally divided between them.

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Demoville & Co. v. Davidson County.

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DEMOVILLE & CO. v. DAVIDSON COUNTY.

(Nashville. January 17, 1889.)

1. DRUGGISTS' RELIEF ACT. *Construction. County taxes. Judgments.*

Acts 1887, Ch. 89, releasing all druggists from liquor dealers' *privilege taxes* incurred by them under Acts 1881 to 1886 inclusive, where the liquors were sold, in good faith, for medicinal uses only, operates to release such taxes, when due to counties, and also where suits were pending, or judgments had been rendered therefor at date of passage of Act.

Act construed: Acts 1887, Ch. 89.

2. SAME. *Constitutionality of Act. "Class legislation."*

That Act is not obnoxious to the constitutional prohibition against the passage of laws for benefit of individuals—"class legislation."  
The class provided for by the Act is a natural, not an arbitrary, one.

Constitution construed: Art. XI., § 8.

Case cited and approved: Davis v. State, 3 Lea, 380.

3. SAME. *Same. Retrospective laws.*

Nor to the constitutional prohibition against the passage of retrospective laws. The Legislature has the power, by a *general law retroactive in its operation*, to release *privilege taxes* due the State and counties.

Constitution construed: Art. I., § 20; Art. II., § 28.

Cases cited and approved: McEwen's Case, 5 Hum., 285; Kurth v. State, 86 Tenn., 134; 4 Watts & S., 401; 40 Ga., 416; 19 Ark., 308.

Cited and distinguished: State v. Burnett, 6 Heis., 186.

*Questions reserved:* As to validity of a special or partial law releasing a privilege tax, and of laws releasing property taxes.

4. SAME. *Same. Assumption of judicial powers by Legislature.*

Said Act, in directing dismissal of pending suits on stipulated conditions, operates alone upon the collecting officers and not upon the Courts; and is not, therefore, an unauthorized invasion of the province of the Courts by the Legislature.

Constitution construed: Art. II., §§ 1, 2.

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5. SAME. *Same. Obligation of contracts.*

Said Act, in so far as it releases taxes due to counties, impairs the obligation of no contract—the rights of creditors of the counties not being involved. The counties are only emanations from the State, and subject to its control in this respect.

Constitution construed: Art. I., § 20.

Case cited and approved: Luehrman v. Taxing District, 2 Lea, 425.

Cited and distinguished: Nashville v. Towns, 5 Sneed, 186.

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FROM DAVIDSON.

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Appeal from the Chancery Court of Davidson County. ANDREW ALLISON, Ch.

The State and Davidson County had, prior to Act 1887, releasing druggists from liquor dealers' taxes, recovered decree in Supreme Court against complainants for such taxes, in consequence of sales of liquors made by them during the years 1881 to 1886, inclusive, under their druggist's license.

(See Druggists Cases, 86 Tenn., 449.)

Executions were issued on said decree and placed in the hands of the Sheriff of Davidson County. The complainants, relying upon said Act of 1887 as a release of their liability, filed their bill to enjoin said executions.

Issues were made up, and on complainants' demand were tried by a jury. Verdict and judgment for complainants. Defendants appealed.



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Demoville & Co. v. Davidson County.

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EAST & FOGG and DEMOSS & MALONE for Complainants.

Attorney-General PICKLE, THOS. J. FREEMAN, and J. B. DANIEL for Defendants.

LURTON, J. The material question arising upon this appeal involves the constitutionality of an Act of the Legislature passed March 9, 1887, entitled "An Act to relieve druggists of all taxes that have accrued against them as liquor dealers under the revenue laws of 1881-2, 1883-4, and 1885-6."

This Act is as follows:

"Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That all druggists in this State who have made themselves liable for taxes as liquor dealers under the revenue laws of 1881-2, 1883-4, and 1885-6, making them liquor dealers, and who were not in fact using the druggist's license as a blind, but were in good faith only selling the prohibited articles as medicine, be and they are hereby relieved of all liability for those years.

"Sec. 2. *Be it further enacted*, That in all cases falling under the provisions of the foregoing section, where suits have been brought and are now pending in any of the Courts, the same shall be dismissed at defendant's cost, and that defendants shall be liable for and pay all attorneys' fees due by the State for the institution and prosecution of

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suits against druggists under the laws of 1881-2, 1883-4, and 1885-6.

"Sec. 3. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it." Acts 1887, page 179.

The first objection urged is that the Act is in violation of Article II., Section 8, of the Constitution, which reads as follows:

"The Legislature shall have no power to suspend any general law for the benefit of any particular individuals inconsistent with the general laws of the land, nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law."

This clause "does not prohibit legislation for the benefit of classes composed of any members of the community who may bring themselves within the class." *Davis v. State*, 3 Lea, 380.

But it is argued that all liquor dealers constitute a class, and that this Act singles out one portion of the class—to wit, druggists, who have sold for medicinal purposes only—and extends relief alone to them. But druggists are not liquor dealers in any true sense. It is a fact of common knowledge that the sale of liquors for medicinal purposes has, until very lately, been a recognized part of the ordinary and legitimate

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business of a druggist, and permissible under the ordinary license of a merchant engaged in the drug business. If a druggist sold liquors as a beverage he became thereby, in fact as well as in law, a liquor dealer. The revenue laws of 1881-2, and subsequent years, were extended to druggists who sold liquors for other than sacramental uses. Thus druggists as a class, *eo nomine*, were required to pay the liquor dealer's privilege tax if they sold even for medical purposes. These Acts were construed and their validity passed upon in the Druggists' Tax Cases, reported in 1 Pickle, 449.

The Act now under consideration extends relief to all of this class who have made themselves liable to such tax for the years named therein, who have not, by the character of their sales, made themselves liquor dealers in fact—that is, the relief is extended to all of the class, druggists, who have sold for medicinal purposes only—while those who have sold as a beverage, and thereby become members of the “liquor dealer” class, are not relieved.

The class thus described by the Act form a natural and not an arbitrary class, and legislation with regard to this class is not for the benefit of individuals within the meaning of the Constitution. But it is said that the Act makes no provision for the return of the tax to such as have paid it, and that it is therefore partial. This might be dismissed with the suggestion that it does not appear that there are any such. But would this

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be an objection to such an act? This liability, after it was incurred, became a debt due the State, and the relation of debtor and creditor existed. Can the State release or compromise with its debtors? Resolutions and Acts releasing bail bond for forfeitures, and compromising or releasing sureties upon the bonds of revenue and other officers, are not uncommon, and their validity has been unquestioned. That the power to settle, compromise, and even release a liability due to the State ought to exist somewhere is most obvious.

Concerning this power this Court, in *McEwen's Case*, reported in 5 Hum., 242, said:

"That the Legislature of the State, in the absence of constitutional prohibition, is the proper guardian and protector of its funds, no matter for what purpose appropriated, and that, as such, it is its duty to watch over them, to see that they are properly secured, vested, and applied as the law may direct, is a proposition so palpably in accordance with reason and necessity that it were a waste of time to enter into argument to prove it. It necessarily follows that, if these funds, or any portion of them, be out of the treasury and in the hands of a citizen, the power to collect, compromise, and arrange the same with the citizen belongs to the Legislature, to be exercised according to its best judgment for the security and prosperity of the State, and upon principles of right and justice to the citizen. This power on

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the part of the Legislature is supreme, and it may be exercised by that body in its collective capacity, or it may be delegated to a commission, the decision of which, when made in pursuance of the power delegated, is equally final and conclusive." 5 Hum., 285.

The legislative power of the General Assembly of this State extends to every subject, except in so far as it is prohibited, either by the delegated powers of the Federal Government or by the restrictions of our own Constitution. *Davis v. State*, 3 Lea, 376.

He who would show the unconstitutionality of an Act of the Legislature must be able to put his finger upon the provision of the Constitution violated. That the power of compromising or releasing a liability may be abused is no answer to its existence. All human power is liable to abuse. The power of public opinion, the responsibility of legislators to their constituents, are likely to prevent any very great abuse of such power, and afford reasonable guarantees for its proper exercise. There is no clause of the Constitution which prohibits the Legislature from releasing any of its debtors, and indeed the learned counsel representing the State do not challenge its existence with regard to individual debtors. But they insist that its exercise must be restrained by the limitations contained in the Constitution requiring all legislation to be general. This argument, if sound,

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might require the State, if it released one debtor, to release all in a similar situation. This is not reasonable, for it is conceded that the State may compromise with or release a single debtor without extending the same terms to other debtors on the same account.

Now, if the State may, by resolution or bill, compromise with or release one debtor, or the sureties upon a particular bond, why may it not include, in the same release, any number of debtors? If such an Act or resolution would be valid if the debtors relieved were named, why will it not be equally valid if those to whom relief is extended are by the Act so described as to constitute a class? We can see none. That the release is conditional upon the existence of certain facts, or upon acceptance of certain terms, such as are named in the second section of this Act where suit has been brought, is not at all objectionable. The second section is operative only upon the collecting officers of the State, and requires *them* to dismiss suits pending upon acceptance of the terms of the Act by the defendants. It contained no mandate to the Courts.

The case of the *State v. Burnett*, 6 Heis., 186, is relied upon by the Attorney-General. The Act considered in that case was one refunding to the tax payers of Roane County the State tax on property paid by them upon the assessment for 1864. The decision in that case was put upon the ground that the Act undertook "to donate to certain in-

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dividuals in Roane County, out of the treasury of the State, the several amounts paid by them into the treasury in 1864, but confers no such benefit on the other individuals in other counties of the State who had made like payments."

The result reached in the case was right. The donation of a fund from the State's treasury is a very different proposition from the release of a liability to the State. The appropriation of public moneys to other than public purposes would be beyond the legislative power, and in a clear case might be restrained by the Courts. *Trustees of Bank Academy v. George*, 14 W. Va., 411; S. C., 35 Am. Rep., 760.

The case is to be distinguished from this in another respect. The tax refunded in that case was a property tax. The tax released in this case is a privilege tax. Article II., Section 28, of the Constitution requires that property taxation shall be equal and uniform, while there is no such express requirement as to privileges, which the same section declares may be taxed in such manner as the Legislature may from time to time direct. *Kurth v. State*, 2 Pickle, 134.

The refunding of a property tax to the people of one county would probably operate as unequal taxation. That case is in no aspect controlling as to the question now under consideration, for if the validity of an act releasing certain tax payers who have incurred liability for a privilege tax depends upon its applicability to all members of the com-

munity in a like situation—a question which we reserve—then the requirement is met in this case, for druggists selling liquors for medicinal purposes only form a natural and not an arbitrary class, wholly distinct from liquor dealers in any true or legal sense of the term. The Act is therefore not one for the benefit of individuals within the meaning of the Constitution.

That the act applies alone to past delinquencies, and has no prospective effect, does not make it retrospective legislation in the sense of the Constitution. All release acts or resolutions settling, compromising, or releasing liabilities due to the State are in one sense retrospective, but there can be no doubt that a State may pass such retroactive laws as only waive her own right without violating the Constitution. Black's Constitutional Prohibition, Sec. 221; *Davis v. Dawes*, 4 Watts & S., 401; *Lewis v. Turner*, 40 Georgia, 416; *Myers v. Byrne*, 19 Ark., 308.

That such a release act may have been unwise furnishes no reason for declaring it void. The policy of such legislation may be debatable, but the Legislature must settle all such questions under their responsibility to their constituents. The question as to this Court is one of legislative power. If this existed the act must stand. The operation of the act is obviously to release *all* who have made themselves liable by sales for medicinal uses. It does not, therefore, matter whether the liability has been reduced to judgment before the passage



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of the Act or is still the subject of a pending suit. If the party liable chooses to rely upon the release, he may do so by injunction bill, as in this case, or by pleading it and offering to comply with the terms of the second section when suit was pending at passage of the Act.

Does the Act release the liability of complainant to Davidson County for this privilege tax? We think it does. The liability was incurred to both State and county under the same law and upon the same state of facts. The Act releases the class of citizens described in the Act from *all* liability incurred during certain years. The terms are comprehensive enough to embrace liability to the county as well as the State. The State may release a liability to the county for such a tax as well as it may release liability to itself. The county is but an emanation from the State. It does not exercise any power or franchise under any contract between itself and the State. The latter creates, and it may destroy. The State delegates the power of taxation, but it may withdraw such power, and itself assess taxes for municipal purposes. *Luehrman v. Taxing District of Shelby County*, 2 Lea, 425.

If the Legislature may wholly withdraw the taxing power from a county, it may release a tax assessed by the county. The greater power includes the less. There is no contract that the county shall be permitted to collect such a tax,

and no creditor's rights are involved in the case under consideration.

The case of *Nashville v. Towns*, 5 Sneed, 186, is not in point. The Legislature has no authority to authorize a county to levy a tax for any other than a county purpose (Article II., Section 29). Therefore an act authorizing the application of a county tax, assessed for county purposes, to be paid over to the city of Nashville to be used for city purposes, was void. This is all that was decided in that case. What is said about contract rights or vested rights is dictum.

The Act relied upon by complainants is valid, and the decree of the Chancellor affirmed, there being no error in his decree.

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Gross v. Davis.

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GROSS v. DAVIS, Adm'r.

(Nashville. January 19, 1889.)

I. CONTRIBUTION AMONG SURETIES. *Rules of, in equity. Pleading.*

I. In a suit in equity by a surety against his co-sureties for contribution, only the solvent sureties are taken into account.

(Riley v. Rhea, 5 Lea, 116.)

II. A surety who has paid less than his ratable share of the joint liability cannot enforce contribution, even against co-sureties who have paid nothing.

III. The proper method of contribution among sureties is to divide the entire joint liability—whether paid by one or more—by the number of solvent sureties, and charge each with his share thus ascertained, and credit him by entire amount of his payments.

IV. A suing surety, who has overpaid his share, may recover the excess of his co-sureties *equally*—there being no intervening equity—provided it subjects none of them to payment of more than his proper share of the entire joint liability.

V. A defendant surety, who has overpaid his share, cannot recover the excess of his co-sureties, upon answer merely, without cross-bill.

2. SAME. *Attorneys' fees.*

Attorneys' fees incurred and paid by a surety, with consent of his co-sureties, in making a prudent defense, for the common benefit, constitute part of the joint liability, and are a proper matter for contribution.

Case cited and approved: 56 Am. Dec., 102 (23 Vt., 581).

3. SAME. *Costs.*

Costs adjudged against the sureties jointly, in litigation touching the joint obligation, and paid by one of the sureties, are a proper matter for contribution.

Case cited and approved: 17 Maine, 64.

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FROM FRANKLIN.

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Appeal from the Chancery Court of Franklin County. W. S. BEARDEN, Ch.

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Gross v. Davis.

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ESTELL & WHITAKER for Gross.

MARKS & GREGORY and JOHN SIMMONS for Defendants.

CALDWELL, J. This is a bill for contribution among sureties.

In April, 1860, John G. Enochs was qualified as Clerk of the County Court of Franklin County, with Gross, Henderson, Colyar, Slatter, and others as sureties on his official bond.

After the close of the war several suits were instituted against him and his sureties. One of those suits finally resulted in a decree, in this Court, against the defendants for about \$800, besides costs. The others were successfully defended.

Gross paid the greater part of the decree mentioned, including \$130 Court costs. The other part of that decree was paid by Davis, as personal representative of Slatter, who had died.

Enochs, the principal, and all the sureties, except those above named, were insolvent when the present proceedings were commenced, and for that reason were not made parties.

In his answer Davis set up the fact of the payment made by him on the decree, and insisted that the estate of his intestate was thereby discharged from further liability.

Henderson claimed in his answer that he had paid for himself and co-sureties more than \$1,000

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Gross v. Davis.

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in fees to lawyers, for defending the several suits brought against them and Enochs.

Colyar made no defense, and decree *pro confesso* was taken against him.

The Chancellor adjudged that Gross was entitled to recover from Davis, Henderson, and Colyar, each, one-fourth of the sum he had paid, with interest, making the recovery against each of the three \$210.06. He then adjudged that Davis was entitled to a credit on the recovery against him by the amount of one fourth of the sum which Davis had paid, with interest. That credit being \$48.04, the net balance of the recovery against Davis was \$162.02. Nothing was allowed Henderson on account of attorneys' fees claimed to have been paid by him.

Both Davis and Henderson have appealed.

The decree is erroneous. It proceeds upon the idea that *every surety* who has paid a part of the joint liability may recover from each of his co-sureties his proportionate part of the sum so paid.

As applied to a case where the whole liability has been discharged by *one* of several sureties, the rule adopted by the Chancellor is correct; but it is not applicable when more than one of the sureties have made payments on the joint indebtedness. In the latter case all payments must be added together, and the aggregate divided equally among the sureties.

To illustrate: If the \$840.24 paid by Gross had

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Gross v. Davis.

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discharged the whole liability, and none of the other sureties had paid any thing, he would be entitled to a decree against each of the other three solvent sureties for one-fourth of that amount, namely, \$210.06. But as the Chancellor adjudged that Gross paid \$840.24 and Davis \$192.16, and that the other sureties had paid nothing, he should, in that case, have added those two sums together, and divided the aggregate of \$1,032.40 into four equal parts of \$258.10 each, and allowed contribution accordingly.

The decree thus indicated, upon the *data* used by the Chancellor, would have given Davis credit for the full amount paid by him, and settled the equities of all the sureties, instead of allowing him credit for only \$48.04, and leaving him with a claim for the same amount against both Henderson and Colyar, as does the decree actually pronounced.

It is well settled that one surety may have contribution from his co-sureties only when, and to the extent that, he may have paid more than his ratable proportion of the joint liability. Brandt on Sur. and Guar., Sec. 251.

The very foundation of the doctrine is the fact that one has paid more and another less than his share. Hence Davis could not maintain a suit for contribution at all under the facts of this case. He could not recover from Henderson and Colyar the one-fourth of the amount he has paid. Yet

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Gross v. Davis.

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the decree leaves him with his claim therefor against each of them.

The decree of the Chancellor is erroneous not only in the result reached upon the assumption that only Gross and Davis had made payments on the joint liabilities, but it is also erroneous in that assumption itself; for it is distinctly proven that Henderson paid \$1,087.60, for which all the sureties were legally bound to contribute. This sum includes principal and interest up to the time he gave his deposition, which, though in fact a little earlier, we treat as of the date of the decree below. This particular date for the addition of interest is adopted for convenience, because the sums already stated as having been paid by Gross and Davis, respectively, include interest up to the same date.

Then we find the fact to be that Gross paid \$840.24, Davis \$192.16, and Henderson \$1,087.60, making a total of \$2,120, one fourth of which is \$530. The \$530 represent the share of each of the four solvent sureties. This being a suit in equity the rate of contribution is determined according to the number of solvent sureties, and not by the number of sureties on the bond, as in an action at law. *Riley v. Rhea*, 5 Lea, 116; Brandt on Sur. and Guar., Sec. 252. In Chancery the insolvent principal and insolvent sureties are not even necessary parties. Brandt on Sur. and Gua., Sec. 256.

Henderson has paid more than his part; hence no recovery can be had against him, and, notwithstanding his excessive payment, he can have no recovery in his favor in this proceeding for the excess, because he set up his payment as a matter of defense *only*, and did not seek any affirmative relief against any one. Gross, however, having filed his bill for that purpose, is entitled to contribution from Davis, who has paid less than his share, and from Colyar, who has paid nothing. The amount paid by Gross in excess of his share is \$310.24. That, with interest from date of decree below, he is entitled to recover from Davis and Colyar—one-half from each. We say one-half from each, because the bill treats these two defendants as equally liable to the complainant, and seeks the same decree against each of them. Such expression in pleading, on the part of the complainant, will be regarded, when there is no contravening equity.

The fact that Davis has already paid something and that Colyar has paid nothing affords no reason why Gross should not have an equal recovery against each of them, for one-half the excess paid by Gross and the full sum paid by Davis together do not aggregate as much as \$530, the share of one surety in the whole liability discharged.

It has been argued in behalf of Gross that the doctrine of contribution does not extend to attorney's fees, and that, for that reason, the pay-



ment of \$1,087.60 by Henderson was properly disregarded by the Chancellor.

In this view we cannot concur. Suits were commenced against Enochs and his sureties. The services of counsel were needed by the sureties, who made a common defense. Counsel were employed in the name of all the sureties, and rendered services for their mutual benefit. Gross knew this. He accepted the services, took an interest in the progress of the litigation, and distinctly agreed with his co-sureties, from time to time, that he would pay his share of the fees. These were the fees paid by Henderson.

The employment of counsel was not only prudent, but it was necessary, and probably resulted in saving the sureties large sums of money. A surety who pays fees under such circumstances is entitled to contribution the same as another surety who pays a judgment or decree recovered against them. By the authorities it is sufficient that the fees were incurred in making a prudent defense. *Fletcher v. Jackson*, 56 Am. Dec., 102 (23 Vt., 581); *Brandt on Sur. and Guar.*, Sec. 247; 4 A. & E. Eve. of Law, 3, Note 1.

As against Gross it is insisted that the Chancellor erred in allowing him contribution for the \$130 of Court costs which he paid. The decree in this respect was right. It has been well said by the Supreme Court of Maine that "the costs cannot be distinguished from the debt. Every

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 State v. Fisk University.
 

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equitable principle which entitles the plaintiff to contribution for the one applies equally to the other." *Davis v. Emerson*, 17 Me., 64; Brandt on Sur. and Guar., Sec. 247.

Contribution was decreed as to traveling expenses in *Preston v. Campbell*, 3 Haywood, 20.

Let the decree below be reversed, and decree be entered here in accordance with this opinion. One-fourth of all costs in this cause will be paid by each of the four parties.

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STATE v. FISK UNIVERSITY.

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(Nashville. January 22, 1889.)

I. TAXATION. *Exemptions of property held and used for school purposes.*

Statutes exempting property from taxation when "held and used for purposes purely religious, charitable, scientific, literary, or educational" are less strictly construed than like statutes exempting property held and used for private gain or individual profit.

Constitution cited: Art. II., § 28.

Acts construed: Act 1883, Ch. 105; Code, § 601 (M. & V.).

Cases cited and approved: *University v. Skidmore*, *ante*, p. 155; *Northwestern University v. People*, 88 Ill., 333; *Seminary v. People*, 106 Ill., — (S. C., 46 Am. Rep., 702); *Griswald College v. State*, 46 Iowa, 275 (S. C., 26 Am. Rep., 138); *Tax Commissioners v. People*, 6 Hun. (N. Y.), 109; *Academy v. Wilbraham*, 99 Mass., 599; *State v. Ross*, 24 N. J. Law, 497; *People v. Commissioners*, 10 Hun., 246.

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State v. Fisk University.

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2. SAME. *Same. Case in judgment.*

Fisk University, a chartered institution of learning, purchased as its permanent site three separate blocks of land, located near Nashville, containing six or eight acres each, and separated by streets. Upon the north and south blocks extensive college buildings were erected. The middle block was assessed for taxes in 1884. Two small frame buildings located on it were then used for school purposes. Barn and stables were also located on this block, and a crop of corn, hay, and vegetables were raised on part of it each year, and used at the University. This block, like the other two, was purchased and held for use of the University, and it was contemplated that other college buildings would be placed upon it, when a fund sufficient for that purpose could be raised. Part of such a fund had then been raised. The property had not been, prior to 1884, assessed for taxation. The University was in actual operation, having two hundred and fifty to three hundred students.

*Held:* That said entire property was exempt from taxation under Act 1883, Ch. 105.

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FROM DAVIDSON.

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Appeal from the Chancery Court of Davidson County. ANDREW ALLISON, Ch.

Attorney-General PICKLE and J. B. DANIEL for Complainants.

JOHN RUHM for Defendant.

FOLKES, J. This is a bill filed by the State and county to collect taxes assessed for the year 1884 upon a lot containing six or eight acres. The cause was heard upon an agreed statement of

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facts, and the bill dismissed by the Chancellor, and is now before us on appeal by complainants.

The statement of facts is as follows:

*First*—"The Fisk University is an educational institution, chartered under the laws of Tennessee. It is a college for colored people of both sexes. Connected with the college is a dormitory, where from two hundred and fifty to three hundred boarding pupils are entertained. But this dormitory is not located on the land sought to be taxed in this case. It is located in 'Jubilee Hall.'

"In purchasing its permanent site Fisk University secured three separate blocks of land, located in the thirteenth civil district of Davidson County, each square or block containing six or eight acres, and each separated from the others by streets only."

*Second*—"The Fisk University building known as 'Jubilee Hall' was, several years ago, erected on the north square, and in 1881 thereafter the building known as 'Livingstone Hall' was erected on the south square. The remaining or middle square remains vacant, except as hereinafter recited, and was so in 1884; and this is the square assessed for taxes for 1884, and for the collection of which this suit is brought." (The amount of the taxes claimed is then set out, but no question is made on the amount.)

*Third*—"It is contemplated by the officers of the University now in charge, at some time in the

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future not yet determined, when funds are provided for that purpose—and such a fund is being raised, and a small portion has already been accumulated for that purpose—to erect another large building for college purposes, and to erect the same on this vacant lot; and this is the real purpose for which this land was purchased, and has been and is now held. Another purpose of owning this land is to keep any other parties from building on or occupying the same.”

*Fourth*—“A part of this lot is leveled off, and some trees have been planted thereon. A portion of it is each year cultivated, and was for 1884, and a crop of corn and vegetables raised thereon. Hay is also grown yearly on this lot, and mowed and fed to the cows. Stables and barns are located on one corner of this lot, and were in 1884; also one small frame building used for school rooms for the students in the primary department; also another frame building for the intermediate department, built in 1887.

Pupils of the college are engaged in attending to the raising of corn, hay, and vegetables. Those so engaged receive pay for their work in board and tuition. The corn and hay raised is fed to the cows and horses belonging to and connected with the college. The vegetables are used in the college mess room, which mess room is situated in ‘Jubilee Hall,’ and is used for college purposes merely.

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*Fifth*—"No taxes have ever been paid by the University on any of this property."

We have given the entire agreed case as made by the parties, although it is manifest that much of it may be said to be immaterial.

Counsel for complainants have assigned as error "that the property in question was not *used exclusively for educational purposes*," but that "it was used for *farming and gardening purposes*," and that under the State Constitution and the Act of 1883, in force at the time of the assessment now involved in this suit, all property must be taxed, save such as is "*used exclusively for purposes purely educational*," and that to obtain benefit of the exemption claimed, it must be *actually so used*.

The language of the State Constitution of 1870, Article II., Section 28, upon this subject is as follows:

"All property, real, personal, and mixed, shall be taxed, but the Legislature may exempt such as may be held by the State, by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational."

The Act under which the assessment in this case was made is to be found in Acts 1883, Chapter 105.

Section one provides for assessment of all property, "except such as is declared exempt in the next section."

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Section two enacts "that the property herein enumerated shall be exempt from taxation, and none other."

Subsection two exempts "all property belonging to any religious, charitable, scientific, literary, or educational institution, and actually used for the purpose for which said institution was created."

The contention on behalf of the State and county is that, inasmuch as the Constitution of 1870 requires all property to be taxed, with the exceptions therein stated, the exception and exemption must be strictly construed, and nothing not within the letter of the exception must be allowed to escape its share of the burdens of government.

It is unnecessary to resort to argumentation or to cite authorities for the general principle that exemptions from taxation are generally to be construed with great strictness. Our reported cases state and maintain the rule as contended for, and this Court has no purpose or disposition to depart from such construction. But this, like all other rules of construction, is made to rest upon the intention of the Legislature, and will not be allowed to defeat the will of the law-making branch of the Government.

To apply this strict construction to individuals and to corporations for profit is but to announce the judgment of the Courts upon the intention of the Legislature, while to give to a constitutional or legislative Act granting an exemption in aid of institutions literary and educational, a construction

that is within the spirit, policy, and purpose of the Act, and not opposed to its letter, is likewise but ascertaining and declaring the intent of the law-making power.

It is not difficult to arrive at the intention of the Legislature with reference to the substantial benefits which the exemption in question is intended to confer upon such institutions. The Constitution of 1870, which authorizes the exemptions, in another section says:

“Knowledge, learning, and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State being highly conducive to the promotion of this end, it shall be the duty of the General Assembly, in all future periods of this Government, to cherish literature and science.”

And while it is true that this language is found in the section which treats of the common school fund, it is not confined to it, but is declaratory of the sense of the Constitutional Convention on the subject of education, and the duty of subsequent Legislatures to cherish. To this must be added the fact that our laws make most liberal provisions for the maintenance of public schools in counties, towns, and cities, and levy taxes upon polls and property to sustain same.

How can it be contended that it is the policy of the State to encourage education, and to levy direct taxes upon its citizens for the purpose of



furnishing education free, and at the same time refuse exemption to the property of educational institutions which conduce to cheapen education, and place the higher branches thereof within reach of those who would otherwise be a direct tax upon the people of the State if they were to leave such institutions as this of the defendant, and resort to the public schools?

Now we do not have to resort to any latitude of construction to reach a conclusion that will sustain the decree of the Chancellor in the case at bar. Any thing like a reasonably fair construction of this Act in question will exempt this property from taxation. There is upon the ground a building actually used for the purpose of teaching the primary department, and the bill does not seek to separate the portion of the lot so occupied from the part used for the stables and for hay, corn, and vegetables, to say nothing about the fact that the students get credit on board and tuition for the work they do upon the ground in working on said crops. Nor is there any thing to repel the idea that the land is actually used for the purpose for which said institution was created in the fact that it is separated from the two main buildings by streets. It was purchased at the same time, and the lots have been improved as far as the means of the institution would permit in the erection of buildings for the purposes for which said institution was created. To give the language of the Constitution the strict construction

contended for by the complainants would lead to excluding every portion of the grounds and every portion of the property not *actually used* in education. It would include only *school buildings, desks, books, etc.*, and would exclude ornamental promenade grounds, play grounds, and gymnasium buildings, and infirmary or hospital buildings for the pupils.

The agreed case fails to show that any of this property is used for profit or for purposes not embraced within the duties of the defendant as an institution of learning. There are many adjudged cases from different States, and much in the textbooks, which are not easily to be reconciled, growing out of exemptions somewhat similar to those under consideration here.

It is not our aim at this time to discuss these cases, nor to define nor limit what uses may or may not be within the exemptions referred to. We only decide that the intention of the Legislature must govern in ascertaining the extent of such exemptions, and that in arriving at such intention the same strictness of construction will not be indulged where the exemption is to religious, scientific, literary, and educational institutions that will be applied in considering exemptions to corporations created and operating for private gain or profit. In the latter character of cases entirely different considerations move the Legislature, and the exemptions are intended to go no further than they have in terms provided. Nor can it be said that a liberal construction should be given to ex-

emptions heretofore granted railroads, etc., because the Constitution says: "A well regulated system of internal improvement, etc., ought to be encouraged by the General Assembly." It is manifest that this provision has reference to the multiform means in which such improvements could be encouraged without relieving them from taxation. The language is retained in the Constitution under which the Legislature has no power to exempt improvements from taxation, and this Court has uniformly held exemptions from taxation to a strict construction in all such cases. Nor do we mean now to extend exemptions for educational purposes, by any free or latitudinous construction, to any matters not fairly and reasonably within the intention of the Legislature, that intention to be arrived at from the language used and from the policy of the State with reference to such institutions, and the purpose and scope of the particular act under consideration. This idea is clearly put in the opinion pronounced at this term in the case of *University v. The State*. It is true that the identical question there decided turned upon the matter of *title* instead of *use*; but the whole subject is incidentally discussed in the opinion, and is instructive as to the policy of this State.

So much has been written in the text-books and reports expressive of the divergent views on this subject that it would be unprofitable to review the cases; so that we content ourselves with merely a reference to a few of them.

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*Northwestern University v. People*, 88 Ill., 333, where the State Court took the view advanced by counsel here for complainants. The cause was carried to the Supreme Court of the United States, where that learned tribunal reversed the decision of the State Court upon lines which we have pursued in the disposition of the case at bar.

And the Supreme Court of Illinois, in a later case under the Constitution of 1870, reported in 106 Ill. and 46 Am. Rep., 702, under the title *Martincello Seminary v. People*, held, under an exemption of of such property "as may be used exclusively for schools," that lands owned and used by the college for the purpose of raising supplies for the college by ordinary farming were entitled to the benefit of such exemption.

In *Griswald College v. State*, 46 Iowa, 275 (S. C., 26 Am. Rep., 138), the Court held that certain houses belonging to the college and used for boarding pupils, and for the residence of professors, etc., were exempt under the language, "devoted solely to the appropriate objects of the college."

To the same effect is *Tax Commissioner v. People*, 6 Hun. (N. Y.), 109. See also *Wesleyan Academy v. Wilbraham*, 99 Mass., 599; *State v. Ross*, 24 N. J. Law, 497; *People v. Commissioners of Texas*, 10 Hun., 246.

We give these cases as illustrations of the idea upon which our disposition of this case depends, and without, by any means, intending to approve the extent to which some of them have gone; for,

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 Pennegar and Haney v. The State.
 

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as is said by Judge Cooley, "the question is, in each instance, whether such property, in the manner in which it has been invested (used), can be regarded as within the *intent* of the exemption."

Upon the whole case, as presented in this record, we are of the opinion that the decree of the Chancellor dismissing the bill should be affirmed, which is accordingly done.

Judge Snodgrass does not concur in the above.

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 PENNEGAR AND HANEY v. STATE.

(Nashville. January 29, 1889.)

I. MARRIAGE AND DIVORCE. *Marriage celebrated in another State invalid in this State, when.*

Marriage, celebrated in another State, between citizens and residents of this State, temporarily there, is invalid here, where the contracting parties—being a wife, divorced for adultery, and her adulterer—procured the solemnization of their marriage abroad for the purpose of evading our statute inhibiting such marriage during the lifetime of the former husband. The marriage is void, as being contrary to a settled public policy of this State.

Code cited: § 3332 (M. & V.); § 2475, (T. & S.).

Cases cited and approved: Owen v. Brackett, 7 Lea, 448; Carter v. Montgomery, 2 Tenn. Ch., 225; State v. Bell, 7 Bax., 9; 30 Grat., 858; 76 N. C., 251, 242; 39 Ga., 321; 10 La., 411; 5 Ired. L., 535.

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Cited and distinguished: Dickson v. Dickson, 1 Yer., 110; 71 Penn. St., 240.

Cited and disapproved: 16 Mass., 157; 9 H. of L. Cases, 193; 113 Mass., 458; 8 Pick., 433; 17 B. Mon., 193.

2. SAME. *Same. Lewdness.*

The parties to such invalid marriage are guilty of lewdness, if they live together as man and wife in this State.

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FROM DEKALB.

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Appeal in error from Circuit Court of DeKalb County. M. D. SMALLMAN, J.

WEBB & AVANT for Pennegar and Haney.

Attorney-General PICKLE for State.

FOLKES, J. The defendants were indicted for lewdness, tried and convicted, and have appealed in error to this Court.

The record discloses the following facts: E. N. Haney was divorced from her husband, John Haney, by a decree of the Circuit Court of DeKalb County, upon the petition of the husband, charging her with adultery with Wm. Pennegar. The decree adjudged the charge fully proven, and the divorce was granted the husband solely upon such charge.

The divorced wife and the partner in her guilt, shortly after the divorce, went to Jackson County,

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State of Alabama, where they were married to each other, and on the next day after their marriage returned to DeKalb County, in this State, the place of their former and present residence, where they have been living and cohabiting openly and publicly as man and wife, all within twelve months before the indictment found in this case, the divorced husband, John Haney, still living.

Section 3332 of M. & V. Code enacts:

“When a marriage is absolutely annulled the parties shall severally be at liberty to marry again; but a defendant who has been guilty of adultery shall not marry the person with whom the crime was committed during the life of the former husband or wife.”

The marriage, being prohibited by statute, is void if solemnized in this State. Bishop on Mar. and Div., Secs. 46, 223; *Carter v. Montgomery*, 2 Tenn. Ch., 225; *Owen v. Brackett*, 7 Lea, 448.

In the last case cited this Court held the woman not entitled to homestead where the marriage was had in this State in violation of the statute quoted above.

It is admitted that there is nothing in the laws of Alabama prohibiting the guilty, divorced party from marrying the paramour.

The question, therefore, presented in this record is whether citizens of this State, prohibited by the statute referred to from marrying, can, by crossing over into a sister State, where such marriages are not inhibited, claim the benefit of the marriage

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there contracted when they return at once to this State, having left it for the manifest purpose of evading our statute.

The question is of first impression in this State, and one not free from difficulty by reason of certain well established principles, universally recognized in the law of marriage, which apparently would sustain such marriage, chief of which is that which says "a marriage valid where solemnized is valid everywhere." Adjudged cases are to be found which, under the supposed application of this rule, have sustained marriages identical with the one at bar in all of its essential facts, while others of equal respectability have reached a different result, to some or both of which we will refer later on. >

Before doing so let us see what are the general principles controlling in cases of this character. Marriage is an institution recognized and governed, to a large degree, by international law prevailing in all countries, and constituting an essential element in all earthly society.

The well being of society, as it concerns the relation of the sexes, the legitimacy of offspring, and the disposition of property, alike demand that one State or nation shall recognize the validity of marriage had in other States or nations, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular State demands otherwise.

It may be said, therefore, to be a rule of universal recognition in all civilized countries that in



general a marriage valid where celebrated is valid everywhere. We say "in general," because there are exceptions to the rule as well established as the rule itself.

These exceptions or modifications of the general rule may be classified as follows:

*First*—Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries.

*Second*—Marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication.

To the first class belong those which involve polygamy and incest; and in the sense in which the term incest is used is embraced only such marriages as are incestuous according to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity and brothers and sisters.

The second class—*i. e.*, those prohibited in terms by the statute—presents difficulties that are not always easy of solution, and have led to conflicting decisions. This class may be subdivided into two classes: First, where the statutory prohibition relates to *form, ceremony, and qualification* it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized not only in other States generally, but in the State of the domicile of the parties, even where they have left their own State to marry

elsewhere for the purpose of avoiding the laws of their domicile. Instead of being called a subdivision of the second class of exceptions, it would be more accurate to say that it is an exception to the exception, and falls within the operation of the general rule first announced of "valid where performed valid everywhere."

To the second subdivision of the second class of exceptions belong cases which, prohibited by statute, may or may not embody distinctive State policy as effecting the morals or good order of society.

It is not always easy to determine what is a positive State policy. It will not do to say that every provision of a statute prohibiting marriage under certain circumstances, or between certain parties, is indicative of a State policy in the sense in which it is used in this connection. To so hold would be to overturn this most solemn relation, involving legitimacy of offspring, homestead, dower, and the rights of property, in the face of the conclusions of approved text-writers and the concurrence of the adjudications in numerous cases relating not only to forms or ceremonies and qualifications of the parties, but also to prohibited degrees of relationship not incestuous in the common opinion of Christian countries, and relating to marriages between persons of different race and color.

Each State or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative as indicative of the

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decided policy of the State concerning the morals and good order of society to that degree which will render it proper to disregard the *jus gentium* of "valid where solemnized valid everywhere."

The Legislature has, beyond all possible question, the power to enact what marriages shall be void in its own State, notwithstanding their validity in the State where celebrated, whether contracted between parties who were in good faith domiciled in the State where the ceremony was performed or between parties who left the State of domicile for the purpose of avoiding its statute, when they come or return to the State; and some of the States have in terms legislated on the subject.

Where, however, the Legislature, as in our own State, has not deemed it proper or necessary to provide in terms what shall be the fate of a marriage valid where performed, but has, in the particular case, contented itself with merely prohibiting such marriages, the duty is devolved upon the Courts of determining, from such legislation as is before it, whether the marriage in the other State is valid or void when the parties come into this State.

If, as we have seen, the statutory inhibition relates to matters of form or ceremony, and in some respects to qualification of the parties, the Courts would hold such marriage valid here; but if the statutory prohibition is expressive of a decided State policy as a matter of morals, the Courts

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must adjudge the marriage void here, as *contra bonos mores*.

Thus, in *State v. Bell*, 7 Bax., 9, this Court held that a marriage between a white person and a negro, valid in Mississippi where celebrated, was void here, in a case where the parties were domiciled in Mississippi at the time of the marriage.

This case is distinguishable from the case at bar, not only by reason of the domicile in Mississippi, but also in that we have a highly penal statute on the subject of marriages between whites and blacks, passed in 1870 in amendment of the Act which prohibited such marriages theretofore, and by the very pronounced convictions of the people of this State as to the demoralization and debauchery involved in such alliances.

The decision in the above case is so manifestly in keeping with sound principles, now well established, that it need not be here fortified by citation of authority. But we pause to call attention to a case relied on by counsel for defendants, holding not only that such a marriage solemnized in Rhode Island (where it was legal) between persons domiciled there would be valid in Massachusetts, but that it was valid in the latter State where the parties had left Massachusetts and gone into Rhode Island for the express purpose of evading the Massachusetts law prohibiting such marriage, and returned to Massachusetts. *Medway v. Needham*, 16 Mass., 157.

This was certainly carrying the doctrine of

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“valid where performed valid everywhere” to an extreme limit. The case has been much criticised, more so, indeed, than it deserves, as it seems to us; for, while to our mind the *result* is startling, it is not out of harmony in its *argument* with the principles we have stated. The learned Judge delivering the opinion, in speaking of the exception to the general rule, says:

“Motives of policy may likewise be admitted into consideration of the extent to which this exception is to be allowed to operate. If without any restriction, then it might be that incestuous marriages might be contracted between citizens of a State where they were held unlawful and void, in countries where they were not prohibited, and the parties return to live in defiance of the religion and laws of their own country. But it is not to be inferred, from a toleration of marriages which are prohibited merely on account of political expediency, that others, which would tend to outrage the principles and feelings of all civilized nations, would be countenanced.”

So that the difference between this case and the 7 Bax., 9, case is a difference in “motives of policy” and ideas of “political expediency.” We do not think, therefore, that the case is open to the criticism passed upon it by the Lord Chancellor in *Brook v. Brook*, 9 House of Lords Cases, 193, which case is itself, with equal propriety, criticised by Gray, C. J., in *Commonwealth v. Lane*, 113 Mass., 458, which contains a very able and

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elaborate review of the subject under consideration. Though unable to concur in some of the arguments, and especially with the dictum that "a marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, *even if the parties are citizens and residents of this Commonwealth, and have gone abroad for the purpose of evading our laws, unless the Legislature has clearly enacted that such marriages out of the State shall have no validity here.*"

Of course we refer to so much of the above as we have italicized, for it is the purest *dictum*, it being a case where there was no proof of an intent to evade the laws of Massachusetts, as is shown by the Judge himself, who concludes his opinion as follows:

"Upon the principles and authorities stated in the earlier part of this opinion, it certainly cannot invalidate a subsequent marriage in another State according to its laws, at least without proof that the parties went into that State, and were married there with the intent to evade the provisions of the statutes of this Commonwealth. No such intent being shown in this case, we need not consider its effect, if proved, nor whether the indictment was in due form."

This case being an indictment for polygamy, where a wife, having obtained a divorce on the account of the husband's adultery (in which case he was prohibited from marrying again without

leave of the Court), the husband married another woman in another State, without proof that the second wife ever resided in Massachusetts prior to her marriage, and without proof of a purposed evasion of the Massachusetts law.

Recurring for a moment to the 16 Mass. case, it may well be that, recognizing and applying the same general principles, the Courts in different States may reach different results in the same class of cases, according as the general and fixed sentiment of the public in the respective States may differ in matters of public policy, and if not of "political expediency."

What might be deemed a mere regulation in one State might be regarded as a matter vitally affecting the morals and good order of society in another; so that what is pointed out as a reproach to the law, by reason of the conflict in the reported cases from different States and nations, is in fact evidence of the universality of the general principles recognized as fundamental by all enlightened Courts, the different results reached being due to the statutory enactments of the different States, as construed by Courts thereof, who interpret the meaning, intent, and scope of each particular statute on the subject of marriage in the light of the known policy of the State, deviating from the general principles of the international law of marriage only so far as they are constrained to do so by the terms of legislative enactments, or

by the manifest and distinctive policy of the State as understood by the Courts.

Now, believing, as we do, that the statute in question, which we are called upon to construe in the case at bar, is expressive of a decided State policy not to permit the sensibilities of the innocent and injured husband or wife, who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce, to be wounded, nor the public decency to be affronted by being forced to witness the continued cohabitation of the adulterous pair, even under the guise of a subsequent marriage, performed in another State for the purpose of evading our statute, and believing that the moral sense of the community is shocked and outraged by such an exhibition, we will not allow such parties to shield themselves behind a general rule of the law of marriage, the wisdom and perpetuity of which depends as much upon the judicious exceptions thereto as upon the inherent right of the rule itself.

After what has been already said in the earlier part of this opinion it is doubtless unnecessary to say that, in reaching the conclusion just announced, we do not intend, in the slightest degree, to encroach upon the principle which recognizes as valid marriages had in other States, where the parties have gone to such other States for the purpose of avoiding our own laws in matters of form, ceremony, or qualification merely; but, confining ourselves to the facts of this case, we hold that



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where citizens of this State withdraw temporarily to another State, and there marry, for the purpose and with the intent of avoiding the statute in question, passed in pursuance of a determined policy of the State, in the interest of public morals, peace, and good order of society, such parties, upon their return to this State and cohabiting as man and wife, are liable to indictment in the Courts of this State for lewdness.

The case of *Dickson v. Dickson*, 1 Yer., 110, has no concern with the point adjudged in the case at bar. That case merely decides that a person divorced in Kentucky for adultery, and not by the laws of that State permitted to marry again, might contract a valid marriage in this State prior to the Act of 1835, which for the first time prohibited such marriages; and having come to this State in good faith, married, and continued to reside here up to the time of her husband's death, she was held entitled to dower. The only instruction to be drawn from this case is that, notwithstanding our statute, these parties might have contracted a marriage in Alabama, where there is no similar statute, had they removed there in good faith, which would be valid in that State.

*Putnam v. Putnam*, 8 Pick., 433, is a case deciding directly contrary to the conclusion we have reached, and the facts in that case were identical with this. It is extremely brief, is unsatisfactory to us from every point of view, and is predicated entirely upon the case of *Medway v. Needham*, 16

Mass., 157, decided ten years before, which the Court said was "binding upon it and the community until the Legislature shall see fit to alter it." While speaking of *Medway v. Needham* the opinion continues:

"The Court were aware of all the objections to the doctrine in that case, and knew it to be *rex-ata quæstio* among civilians; but they adopted the rule of the law of England on this subject on the same ground it was adopted there, namely: the extreme danger and difficulty of vacating a marriage which, by the laws of the country where it was entered into, was valid."

It is manifest that the effort to fortify *Medway v. Needham* by assuming that it is based on the law of England must fail, if the House of Lords are competent to testify as to the state of the law in England on the subject, for we find that in *Brook v. Brook*, 9 H. of L. Cases, 219, the Lord Chancellor, in speaking of the case of *Medway v. Needham*, as we have already seen, says "it is entitled to but little weight, and is based upon decisions which relate to form and ceremony of marriage," and adds:

"If a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants in that country cannot be permitted, by passing the frontier and entering another State in which the marriage is not prohibited, to celebrate a marriage forbidden by their own State,

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and, immediately returning to their own State, to insist on their marriage being recognized as lawful."

This is, in our opinion, the true doctrine, and we have quoted so much to show that the highest English Court does not hold to the principle upon which it is claimed by the Massachusetts Court the Medway case is based. But, with due deference, we must be permitted to say that the decision in the case of *Brook v. Brook* goes farther than we think the principle announced requires—farther, at least, than we would be inclined to go—when, as was done in that case, it was held that, while both were resident in England, the man married his deceased wife's sister in Denmark, where such marriage was legal, and returning to England the marriage was void there, because a marriage between parties so related was contrary to the laws of England. Such a marriage would, we think, not fall within any of the exceptions to the general rule. It certainly cannot be said to be incestuous in the estimation of Christendom, and it would seem that, under the policy of many of the States of this Union, such a marriage is not immoral nor tending to any social evil affecting the welfare of society. But, after all, it must be admitted that it was for that Court to determine whether or not the law infringed was indicative of a decided and essential public policy in England; and the Courts of that country would doubtless be as slow to approve

our estimate of the public policy which condemns the marriage of the divorced adulterer, since the clause prohibiting such marriages was, upon the argument of Lord Palmerston that the guilty party was preserved from ruin by such a marriage, stricken from the divorce bill in the House of Commons, as we are to accept their opinion that a marriage between a man and his deceased wife's sister is contrary to good morals.

We return for a moment to *Putnam v. Putnam* to note that the Court in this case closes its opinion with this language, that "if it shall be found *inconvenient or repugnant to sound principle* [the italics ours], it may be expected that the Legislature will explicitly enact that marriages contracted within another State, which, if entered into here, would be void, shall have no force within this Commonwealth." The Legislature did shortly thereafter so enact, whether because the doctrine laid down in the case was inconvenient or because repugnant to sound principle does not appear. In our view of the law both considerations might well have moved the Legislature.

*Stevenson v. Gray*, 17 B. Mon., 193, is a case holding the doctrine of *Putnam v. Putnam*, and after what we have said about the latter case need not be further noticed here.

*Van Storch v. Griffin*, 71 Penn. St., 240, does not sustain the contention of counsel in the point decided, as there is nothing in the case to show that the parties went from one State to the other

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Pennegar and Haney v. The State.

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for the purpose of evading the laws of the one. It merely holds that the decree of divorce in New York, which forbade the respondent from marrying again during the life of the libellant, had no extra territorial effect; so that what is said in the opinion about going from one State to the other for the purpose of evading the law of the State granting the divorce is *dictum* pure and simple.

In full accord with the conclusion we have reached in the case at bar is *Kinney v. Commonwealth*, 30 Grat., 858, where it was held that a marriage between a negro and a white person had in the District of Columbia, for the purpose of evading the law of Virginia, was void upon the return.

To the same effect see *State v. Kennedy*, 76 N. C., 251; *Scott v. Scott*, 39 Ga., 321; *Dupre v. Bulard*, 10 La., 411.

The intention to evade the law by going into another State was made the test of its validity in North Carolina, as will be seen by reference to the two cases of *State v. Kennedy*, 76 N. C., 251, above cited, and *State v. Ross*, *Ib.*, 242—both marriages between a white person and negro. In *Kennedy's* case, such intention being shown, the marriage was held void; while in *Ross's* case, it being shown that there was *no intent* to return to North Carolina, though the parties afterward did so, the defendant was held not guilty of fornication. This was, however, by a divided Court, and

is contrary to our own case of *State v. Bell*, 7 Bax., 9.

We conclude this opinion, already too long, by a reference to *Williams v. Odtes*, 5 Ired. L., 535, where Chief Justice Ruffin, in delivering the opinion of the Court in a case very similar to our own, says:

“Now, if the law of South Carolina allow of such a marriage, and although it be true that generally marriages are to be judged by the *lex loci contractus*, yet every country must so far respect its own laws, and their operation on its own citizens, as not to allow them to be evaded by acts in another country purposely to defraud them.”

See also Wharton's Conf. of Laws, Secs. 135, 181, 182.

Let the judgment of the Circuit Court be affirmed.

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Morrow v. Iron and Steel Company.

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MORROW v. IRON AND STEEL CO.

(Nashville. February 3, 1889.)

I. CORPORATIONS. *Ultra vires. Stipulation in contract for subscription of initiatory capital stock void.*

A stipulation in a contract of subscription to the *original or initiatory* capital stock of a *manufacturing corporation*, organized under the *general incorporation law* of this State, is without consideration, *ultra vires*, and absolutely void, where it provides that the subscriber shall receive, upon consideration of his subscription, *bonds to the full amount thereof, secured by first mortgage "upon the company's plant,"* in addition to his stock shares for like amount; and the corporation may repudiate such illegal stipulation without releasing the subscriber from liability for his subscription, or subjecting itself to action by him.

Act construed: Acts 1875, Ch. 142; Code, §§ 1851-1874 (M. & V.).

Cases cited: 17 Wall., 610; 105 U. S., 143.

2. SAME. *Stipulation in contracts for subscription of capital stock. Conditions precedent. Covenants.*

Such stipulation is to be regarded as an independent covenant, and not a condition precedent to payment of subscription, where the subscriber paid part of his subscription in cash, and gave notes for remainder to be paid when called for, and after organization become director of the corporation—especially as the mortgage to secure the bonds was to embrace the "company's plant," to be erected out of the fund subscribed.

Case cited and approved: Railroad v. Parks, 86 Tenn., 560.

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FROM DAVIDSON.

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Appeal from the Chancery Court of Davidson County. ANDREW ALLISON, Ch.

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Morrow v. Iron and Steel Company.

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VERTREES & VERTREES for Morrow.

CHAMPION & HEAD and STEGER & WASHINGTON for Company.

LURTON, J. The Nashville Iron, Steel & Charcoal Company is a manufacturing corporation, organized in 1887 under the general incorporation laws of this State. Complainant's bill charges that it was organized upon the following scheme or basis, namely:

"The capital stock was fixed at \$350,000, in shares of \$100 each; the company was also to issue \$350,000 of \$1,000 negotiable, interest-bearing coupon bonds, to run twenty years, secured, principal and interest, by a first mortgage, in the usual form, upon the company's plant. *Every subscriber was to have bonds and also stock of the company, each to the amount of the subscription—that is to say, a subscriber to the amount say of \$1,000 was to pay \$1,000, and therefor was entitled to and was to receive \$1,000 of said bonds and \$1,000 of said stock of the company.*"

Complainant alleges that "upon this basis and plan of operations, as the defendant company well knew, your orator \* \* \* subscribed for \$10,000 of said stock and bonds each—that is, he took an interest to the extent of and subscribed \$10,000, and he was to pay the said \$10,000 upon calls to be made."



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*Morrow v. Iron and Steel Company.*

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Upon this subscription he afterward paid \$1,000, and executed his three negotiable notes each for \$3,000, and payable in March, April, and May, 1888. Subsequently the corporation refused to carry out the scheme by which subscribers were to receive bonds to an amount equal to their stock, and instead resolved to mortgage their property only to the extent of \$100,000, and these bonds they resolved to sell upon the market, applying the proceeds to corporate purposes strictly. This change in the plan of operations seems to have been assented to by all of the subscribers save complainant, who caused his protest to be entered.

The bill alleges that the notes executed by complainant have been transferred to the Commercial National Bank in payment of a pre-existing debt, with notice of the consideration upon which they were executed. This change, the case being heard upon demurrer, together with the fact that the insolvency of the iron company does not appear, justifies us, for the purpose of this case, in treating the bank, as the holder of these stock notes, as standing upon no higher ground than the assignor.

The complainant seeks to be relieved from his subscription upon the ground that the company has refused to carry out its agreement concerning its bonds; that his notes be canceled, and that he have a decree for the money paid in on his subscription. He further prays, in the event he be

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held liable upon his subscription, that the contract by which he was to receive bonds be specifically performed.

The bank and the iron company join in a demurrer, which questions the validity and legality of the contract by which the complainant was to receive the bonds of the company. This demurrer was sustained by the learned Chancellor, and the bill of complainant dismissed.

In considering the meaning and legal effect of the contract set up by the complainant it is important at the outset to observe that this is not the case of a *purchase* of stock and bonds, or either, in an *organized* and *going* corporation. Upon the contrary, the bill states that the contract into which complainant entered was that upon which all shares were to be issued, and that the contract between himself and the corporation constituted what the pleader properly designates the "*basis of organization*."

Whether this "basis of organization" be construed to be a contract whereby each subscriber to the stock was to be given a bond as a bonus, or each subscriber to the bonds was to be given paid-up stock as a bonus, or as an agreement by which each contributor to the capital stock was to receive the obligation of the company, secured by a primary mortgage, that he should be repaid the amount of his subscription with interest, such an agreement would clearly be illegal and ineffective as to existing or subsequent creditors of the cor-

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Morrow v. Iron and Steel Company.

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poration, either upon the ground that the payment for the stock was unreal and simulated or that the bond had been issued upon no consideration. Morawitz on Corporations, Sec. 824; *Sawyer v. Hoag*, 17 Wall., 610; *Scovil v. Thayer*, 105 U. S., 148.

The learned counsel for complainant has very ably and earnestly presented the well understood distinction between contracts which are invalid as to creditors, and yet are legal and binding upon the corporation, a distinction well illustrated by the cases just cited from the Supreme Court of the United States; and he insists upon the doctrine of these cases, that however invalid such an agreement may be as against creditors, that inasmuch as all the subscribers to shares were parties to the same agreement with the corporation, that the arrangement and contract cannot be questioned by such stockholders or by the corporation, and that as between the subscriber and the company the agreement is legal and binding.

This presents a question of great importance, and one which is entitled to receive grave consideration at our hands. There are undoubtedly a class of cases where subscriptions to initiatory stock upon special terms, not *prohibited* by the charter and not in *contravention of any clearly defined public policy*, have been, upon sound principles, held valid as between the subscribers and the corporation, and yet invalid in so far as the rights of creditors were affected upon a condition of corpo-

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rate insolvency ensuing. To this class of cases belong the cases of *Sawyer v. Hoag* and *Scovil v. Thayer*. The invalidity of the special terms upon which the contract of subscription rested in these two cases arose from the well settled doctrine that unpaid stock subscriptions constitute a trust fund for the benefit of general creditors, and that any arrangement or device by which a payment of a stock subscription is simulated or released is void in so far as it operates to discharge a liability in favor of creditors by a subscriber to capital stock. In the first of these cases there was a contract whereby the stock was nominally paid in full, but immediately taken back as a loan to the subscriber. Now the only effect of this arrangement was to work a change in the character of the debt, whereby a debt due as for unpaid stock was to become a debt due as for a loan. The debt in the latter case was one which was subject to offsets in the hands of the borrower, while so long as it was a stock debt it was a trust fund, and the debtor could not apply it exclusively upon his own claim against the insolvent corporation.

Concerning the validity of such an arrangement as between the subscriber and the corporation, Mr. Justice Miller said:

“Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually so far as *they* alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other if it was

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found mutually convenient to do so; and in any controversy which might or could grow out of the matter between the insurance company and the appellant, we are not prepared to say that the company, as a corporation, could deny that the stock was paid in full."

The Court, however, held that, upon a suit by the assignee in bankruptcy of the corporation, the stock had not in fact been paid in such manner as to prevent a recovery for benefit of creditors, and the defendant was not allowed to offset his liability upon his notes given for the alleged loan to him by the company by a claim he held against the corporation.

Concerning this case it is enough to say that the validity of the arrangement as against the company could very well be rested upon the fact that such a lending of money to the share subscriber was not prohibited by the charter of the corporation, and no public policy was violated, in that the corporation had only taken the secured notes of the subscriber in place and stead of his unsecured liability as a share-holder; or these notes stood for and represented an investment of the capital of the company, and being an insurance company expressly permitted to lend out or otherwise invest its funds, no reason occurs why the company should not be regarded as bound by such a change in the character of the debt. The case, however, would be different if such loans, or any other, had been made by a manufacturing corpora-

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tion under the general incorporation laws of this State, the lending of money to stockholders being expressly prohibited by such corporation.

In the case of *Scovil v. Thayer* the stock was subscribed upon an agreement that upon the payment of twenty per cent., paid-up, non-assessable certificates of stock should be issued to the nominal amount of the subscription. Mr. Justice Hunt, speaking for the Court, said, concerning this contract, that, "as between them and the company, this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the shareholder was just as binding as if it had been expressly authorized by the charter."

When he came to consider the matter as it affected creditors he said:

"But the doctrine of this Court is that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervened, and their claims are to be satisfied, the stockholder can be required to pay their stock in full. The reason is that the stock subscribed is considered in equity as a trust fund for the payment of creditors. It is so held out to the public, who have no means of knowing the private contract made between the corporation and its stockholders. The creditor has, therefore the right to presume that the stock subscribed has been or will be paid up, and if it is

not, a court of equity will, at his instance, require it to be paid." 105 U. S., 154.

This case is differentiated from the one now under consideration in several important particulars. First, it is important to notice that the question did not arise between the corporation and the subscriber. The controversy was between subscribers and the creditors of an insolvent corporation. The point only arose because it became necessary to determine when the right of action in favor of the creditor accrued with reference to the statute of limitations which was plead by the stockholder. In order to defeat this defense the Court held that the arrangement was valid as to the corporation; that in equity the meaning and effect of the agreement was this, namely:

"That the stockholder should pay, say, for example, twenty dollars per share on their stock, and no more, unless it became necessary to pay more to satisfy the creditors of the company; and when the necessity arose, and the amount required was ascertained, then to make such additional payment on the stock as the satisfaction of the claims of creditors required."

The Court, upon this construction of this agreement, held that the statute had not begun to run until the assets of the company had proven insufficient to pay debts.

Again, the contract as between the company and the subscriber was *an executed one*, while here

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we have one *executory*, and which the corporation has refused to carry out.

In the third place the Court found that the charter did not prohibit such an agreement, nor was it contrary to any law or public policy of the State of Kansas, where the corporation resided and where the contract was made. But the broadest and most obvious distinction between this case and that will be observed when we analyze the contract set up by complainant and ascertain its legal effect, and then see wherein such a contract is prohibited by the charter of the defendant corporation, and to what extent it may contravene the public policy of this State.

The scheme proposed, upon which this corporation was to be organized, fixed the capital stock at \$350,000. The public has a right to presume that this stock has been, in good faith, subscribed, and that it will be paid. They have also the right to presume that the fund thus subscribed and paid in will, in good faith, be retained in the business of the company, and that it, or the plant and property represented by it, will, in good faith, be held and preserved as a capital and basis of credit and confidence. This much is held out to the public by the representation that its capital stock is \$350,000. But running along with this proposition that there shall be a capital stock of \$350,000 is the additional stipulation that the property of the company, which is to be procured by means of this capital stock, is to be mortgaged



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to secure bonds in amount precisely equal to the whole capital stock, and these bonds, instead of being sold for their market value, and the proceeds applied to corporate uses, are to be divided out among the stockholders.

Says complainant in his bill: "Every subscriber was to have bonds and also stock of the company each to the amount of the subscription." The result of this scheme, if it had been carried out, would have been that each subscriber would have received the obligation of the company to repay to him, with interest, his contribution to the capital stock of the company, and this obligation would have been secured by a first mortgage upon all the company's property.

It was an arrangement whereby the franchise was to be secured, and at the same time deprive the public of the security which by law they are entitled to have, and upon which the grant of the franchise depends. Whatever the real motive and purpose of the promoters of this arrangement may have been, its legal effect, if valid, would have been to have thrown all the risks and hazards of the business upon the public who should deal with it, while the contributors were to reap all possible gains, and should be secured against loss in the event the enterprise proved unprofitable.

Is a contract by which a corporation agrees to repay to the contributors of its capital stock their several contributions, and whereby such contributions are converted into corporate debts, valid even

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as against the corporation? Upon what consideration does such an agreement rest? and what power has a corporation to bind itself by such a contract?

It is true, creditors out of the way, that the assets of a private business corporation belong, in the last analysis, to the stockholders, and that they may, by consent, cease business, and divide the property among themselves. But this ownership of assets is subject to the higher and superior rights of creditors, and as against them shareholders have no rights in these assets. No consent of the corporation or of its share-holders can effectually defeat the prior and superior claims of creditors to the corporation property. Upon the winding up of such a corporation creditors must first be paid. The surplus belongs to the stockholders, and this the corporation is bound to divide among them. But by this contract the corporation, in effect, binds itself to return the capital stock to the share-holders at a fixed time—that is, when the bonds mature—regardless of the rights of creditors, and without winding up the business. More than this, the charter expressly forbids the payment of any dividend which impairs capital stock; yet, by this arrangement, dividends are to be paid under the guise of interest, regardless of its effect upon the capital stock of the company.

It is no answer to say that the invalidity of such bonds as to creditors saves all their rights, and that therefore the corporation ought to be

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suffered to make such contract with its shareholders as it pleases. This argument ignores two very plain considerations:

*First*—The fact that a defense could not be made by creditors against these bonds if they should pass into the hands of innocent purchasers for value.

*Second*—The public policy of this State, as is evident from its legislation concerning such corporations, forbids the recognition of such an agreement.

The theory upon which the State has rendered the acquirement of the franchise to be a corporation so speedy and inexpensive is based upon the assumption that the capital stock which the company holds itself out as having will be in fact paid in, and will stand as a basis of credit instead of individual liability of those associated in business. To secure a corporate capital which shall be a just substitute for personal liability, the law requires, in explicit terms, that nothing shall be received in payment of the capital stock of a manufacturing corporation but cash, or bonds, or patent rights at a fair and agreed valuation. The charter further prevents the creation of debts beyond the capital stock; it prohibits the lending of money to shareholders or the payment of dividends in excess of actual profits. The plain and obvious meaning of all these requirements, in the light of the substitution of corporate liability in the place of personal liability beyond the amount

of stock subscription, implies that the organization stock shall be paid up in full at its par value. The Courts have not hesitated, either in this State or elsewhere, to denounce every stratagem and device by which the payment of stock subscriptions is sought to be avoided.

The facility with which charters are now obtained, the wonderful increase in the number and powers of such organizations, the facilities afforded by the assumption of corporate powers and franchises, to bad and designing men to carry out evil and fraudulent schemes, whereby the public are to suffer, the plainest principles of common honesty and of business integrity demand that these business corporations shall be held to the utmost good faith in this matter of capital stock, and that all such arrangements as that proposed by this "plan of organization" shall be held void and illegal in that it is prohibited by any fair construction of the corporate powers, and in contravention of the plainest and most obvious principles of public policy concerning such companies. Such a contract, being prohibited by law, is therefore beyond the power of the corporation, and is void as to the company, being *ultra vires*.

What we have said as to the construction and legal effect of the subscription involved in this case is not intended to apply to sales of, or subscriptions to, the stock of an *organized and going corporation*, or the sale of the bonds of a going corporation. The necessities of the business of an

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organized company might demand an increase of capital stock, and if such stock is lawfully issued, it may very well be offered upon special terms. In such case, if the market price was less than par, it is clear that a purchaser or subscriber for such stock at its market value would, in the absence of fraud, be liable only for his contract price. So a case might arise where the stock of a going concern was much depreciated, and where its bonds were likewise below par, and there was lawful authority to issue additional stock and bonds. Now, in such case, the real market value of an equal amount of stock and bonds might not exceed, or even equal, the par value of either. In such case, all questions of fraud aside, a purchaser would only be held for his contract price. The case we have been considering is that of the issue of the initiatory or organization stock—that class of stock which is to constitute the capital stock upon which the grant of the franchise depends.

Says Mr. Morawitz:

“It is evident, therefore, that the issue of certificates for paid-up shares to a share-holder, whose shares have not in fact been paid up, is unauthorized; it would be a direct infringement of the rights of all existing share-holders in the company, and a source of fraud upon persons giving the company credit, or dealing in its shares thereafter. However, after the capital of a corporation has been reduced by losses, it would not be a wrong against the existing share-holders to issue certifi-

cates for paid-up shares on payment of less than their par value. Under these circumstances fairness and equality would merely require that the new shares be issued at their *actual* or *market* value. If shares in a corporation could in no case be issued at less than their face value, it would be practically impossible to increase the capital of an incorporation by the sale of new shares after the value of its shares had fallen below par." Morawitz on Corporations, Sec. 306.

The corporation having refused to execute this agreement requiring it to issue its bonds to the subscribers for stock, and having determined that such a contract was void and illegal—as beyond the power of the corporation—it cannot, therefore, be specifically executed.

This brings us to a consideration of the question as to whether the refusal of the corporation to execute this illegal agreement relieves complainant from his liability as a subscriber to the capital stock of this company.

His subscription cannot be regarded as one upon a *condition precedent*. He subscribed not upon condition that, before he should be required to pay, the shares and bonds should be delivered to him. On the contrary, his bill shows that he has already paid \$1,000 upon his liability, and executed his negotiable notes for the remainder, and he states that he was to pay his subscription "*as calls*" should be made. He clearly contemplated that his subscription should be paid before any bonds were

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to be issued, for the bonds were to be secured by a mortgage of the company's plant, and this could not be created except upon the supposition that the capital stock should be paid in, and then *invested in a plant*, which was to be mortgaged to secure the bonds. Where a subscription is taken distinctly upon the condition that it is not to be binding until a stipulated thing is done, then such a subscriber does not become a stockholder, and is not entitled to the rights or charged with the burdens of a stockholder until the condition has been complied with. This Court said, concerning conditional subscriptions:

"The capital of stock companies consists of their stock subscriptions. This is the basis of credit and an essential to organization. This is a trust fund for the benefit of creditors in case of insolvency. Conditional subscriptions to the stock of corporations are unusual, and often operate to defeat subscribers who become such absolutely and upon the faith that all the stock is equally bound to contribute to the hazards of the enterprise. It misleads creditors, and is the fruitful source of litigation and disaster. Tending to the ensnarement of creditors, and contrary to a sound public policy, conditional subscriptions to corporate shares ought not to be encouraged." *Railroad v. Parks*, 2 Pickle, 560.

In that case the subscription was payable one-fourth when the railway was completed to the county line; remainder in four equal installments

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as the work progressed through the county, upon the *proviso that the company established a depot at Newbern*. The company failed before a depot was established at Newbern, and it was insisted that the subscription was thereby avoided. This Court held that the subscription became absolute upon completion of the road to the county line; that the proviso that a depot should be established at Newbern was not a condition precedent, but an independent stipulation; that the acts to be done were to be done at different times, and hence were independent stipulations, and the remedy of the subscriber was for a breach of the stipulation in his favor. A condition subsequent is thus defined by Mr. Cook in his work on Stockholders:

“A subscription on a condition subsequent contains a contract between the corporation and the subscriber, whereby the corporation agrees to do some act, thereby combining two contracts— one the contract of subscription, the other an ordinary contract of the corporation to perform certain specified acts. The subscription is valid and enforceable, whether the conditions are performed or not. The condition subsequent is the same as a separate collateral contract between the corporation and the subscriber, for breach of which an action for damages is the remedy.” Cook on Stockholders, Section 78.

That Dr. Morrow's purpose was to become a share-holder cannot be doubted. The company regarded him as such, and he so regarded himself,



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for he not only acted as a stockholder, but became a director of the corporation. Says Mr. Morawitz:

"If it appears that the subscriber intended to become a member of the corporation, and as such entitled to vote at meetings and otherwise enjoy the privileges of membership, it is clear that the subscription cannot be deemed a subscription upon a condition precedent." Morawitz on Corporations, Sec. 89.

It follows from all that we have said that the stipulation concerning the issuance of bonds to subscribers for capital stock was not a *condition precedent* to liability upon the subscription. It was nothing more than an independent stipulation, for the breach of which the remedy would be in damages. The failure of the company to carry out this collateral agreement does not defeat liability upon the subscription. This breached covenant or independent contract was, however, illegal and void, whether regarded as a condition precedent or subsequent, and for such breach no action would lie.

It follows, inasmuch as complainant is liable in equity and at law upon his subscription, that there is no equity whatever in his bill, and the decree dismissing it with costs is affirmed.

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White v. Fulghum.

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## WHITE v. FULGHUM.

(Nashville. February 3, 1889.)

1. HOMESTEAD. *Statutes liberally construed.*

Statutes exempting homestead are construed liberally in favor of the right.

Cases cited and approved: Dickinson v. Moyer, 11 Heis., 520; Arnold v. Jones, 9 Lea, 548.

(See also 11 Lea, 649, and *ante*, p. 151.)

2. SAME. *In surplus proceeds of mortgaged lands. Reinvestment.*

When lands are sold under decree foreclosing joint mortgage of husband and wife, the mortgagors—if originally entitled to homestead in the *land*—are entitled to homestead in the *surplus proceeds*, if any, realized from such sale; and the fund appropriated to homestead should be reinvested under direction of the Court.

Cases cited and approved: Bentley v. Jordan, 3 Lea, 353-363; Fauver v. Fleenor, 13 Lea, 624.

3. SAME. *Same. Marshaling securities not enforced to defeat homestead right.*

Where, by joint mortgage, husband and wife have conveyed lands, in which they were entitled to homestead, to secure the husband's debt, the mortgagors are entitled, as against the husband's *general creditors*, to homestead out of any surplus realized at the foreclosure sale; and the equity of marshaling securities will not be enforced in favor of such creditors to defeat this right of the mortgagors.

Cases cited and approved: Gwynne v. Estes, 14 Lea, 673; Gilliam v. McCormack, 85 Tenn., 609; 6 Iowa, 19; 31 Ark., 203; 23 Minn., 75.

Cited and overruled: Parr v. Fumbanks, 11 Lea, 392.

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FROM CHEATHAM.

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Appeal from the Chancery Court of Cheatham  
County. GEO. E. SEAY, Ch.

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White v. Fulghum.

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J. J. LENNOX, ALBERT D. MARKS, and A. S. MARKS for Complainants.

A. E. GARNER, R. S. TURNER, and J. P. HELMS, for Defendants.

CALDWELL, J. This is a bill to marshal securities. Defendant J. H. Fulghum and his wife executed a mortgage upon a tract of land on which they resided to secure a debt of \$1,500 to the mortgagee, Wm. Greer.

Thereafter other creditors of Fulghum, with judgments before Justices of the Peace and executions thereon returned *nulla bona*, filed their bill in chancery to foreclose the mortgage by a sale of the land, and to subject the surplus proceeds to the payment of their debts. Foreclosure was refused, because the mortgage had not matured and, the mortgagee refused to consent to a sale; but the Chancellor allowed recoveries in favor of complainants for the amount of their debts respectively, and decreed a sale of the land, subject alone to the rights of the mortgagee, and barring the mortgagor's claim to homestead.

On appeal this Court held that the mortgage was a waiver of the homestead exemption as to the mortgagee only, and not as to other creditors, and modified the decree of the Chancellor so as to direct a sale of the land subject to the mortgage of Greer and the homestead of Fulghum. *Hall v. Fulghum*, 2 Pickle, 451.

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But no sale was made under that decree.

Pending the appeal in that cause, and before the rendition of the decree, Greer's debt matured, and his administrator, widow, and heirs filed their bill to foreclose the mortgage by a sale of the land. That relief was granted, and the Master sold the land, on time, to the complainants in the first cause, taking their notes for the purchase price. The amount of the decree in favor of Greer's estate was \$2,035.50, and the price for which the Master sold the land was \$3,565.

As their notes matured the purchasers paid into Court a sum sufficient to discharge the mortgage debt, interest and costs.

When they had done this they filed the present bill in the same Court to have the balance due from them on their purchase money notes applied to the payment of their decrees against Fulghum.

The chancellor dismissed the bill for want of equity on its face, thereby sustaining the motion of Fulghum and wife and the demurrer of Greer's administrator. The complainants have appealed.

The theory of the bill is twofold: *First*, that the foreclosure proceedings extinguished Fulghum's right of homestead, and left the surplus of the fund, subject to the debts of the complainants, as non-exempt property; *secondly*, that by his mortgage "Greer had a lien on the whole of the land, including all exemptions," while the decrees of the complainants constituted "a lien on the land, sub-

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ject to the homestead right," and that, under such a state of facts, a court of equity will compel Greer's administrator to first exhaust that part of the fund which represents the right of homestead.

The first proposition is true in part, but it is not true as a whole. Though the sale of the land absolutely and without reservation must, of necessity, have extinguished Fulghum's right of homestead in *the land itself*, it by no means follows that it extinguished his right of homestead in *the proceeds* of the land. The mere fact that the land has been converted into money, and that money, as such, cannot be enjoyed as a homestead, cannot destroy the right of homestead after it has once attached to the land.

The homestead exemption is a favorite in this country, and all laws concerning it are by the Courts liberally construed in favor of the claimant. *Thomp. on H. and E.*, Secs. 4, 7, and 731; 11 *Heis.*, 520; 9 *Lea*, 548.

The fund realized from the sale of the land represents the land itself, and is subject to the same liens and rights; it stands in the place of the land, and those having an interest in the latter have the same measure of interest in the former. The right of homestead existed in the land, and was subordinate alone to the encumbrance of the mortgage; so it exists in the fund, subject alone to the prior satisfaction of mortgage debt.

Upon the same principle, in cases where the

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land has been sold to enforce the lien of the vendor (against which lien the claim of homestead can never prevail. Const., Art. XI., Sec. 2; Code (M. & V.), 2935), this Court has more than once held that the vendee is entitled to an exemption in the residue of the proceeds of sale, and that \$1,000 of such residue will be invested, under the directions of the Court, in other real estate as a homestead for the vendee. *Bentley v. Jordan*, 3 Lea, 353-363; *Faurer v. Fleenor*, 13 Lea, 624.

This mode of investment in a new homestead is in accordance with the policy of the statute, which contains a similar provision for cases where sale under execution or attachment becomes necessary because the property levied on is worth more than \$1,000, and is not divisible (Code, 2941); and for other cases where a widow is entitled to both homestead and dower, and they cannot be assigned to her in kind. Code, 2944.

The second proposition advanced in the bill and urged in argument by counsel for complainant rests upon the equitable doctrine of marshaling securities, and its soundness depends upon the applicability of that doctrine to the facts of this case.

The doctrine invoked is well established, both in England and America. It may be briefly stated as follows: Where one creditor has a lien upon two funds or two parcels of other property, and another creditor has a lien upon but one of them, the former creditor will, in equity, be required to seek satisfaction first out of that fund or property

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upon which the other creditor has no lien. 1 Story's Eq. Jur., Sec. 633; 3 Pomeroy's Eq. Jur., Sec. 1414.

Treating the gross fund involved in this case as properly divisible into two parts, one representing the homestead and the other the balance of the fund, and agreeing that Greer's mortgage is a lien upon both of them, and that the complainants have a lien upon the latter part only, we have a plain case for the application of the doctrine mentioned, *provided* it should be further agreed that the whole of the fund is subject to the debts of Fulghum as non-exempt property would be.

But it is not all to be treated as non-exempt property. It has already been seen that Fulghum's right of homestead extends to so much of the fund as may be in excess of the mortgage debt, and that \$1,000 of such excess is to be regarded as exempt. Then the question is whether or not the doctrine mentioned will defeat the right of homestead in that excess.

While that doctrine is well recognized and far reaching in its effect, it has distinct and plain limitations. *It will not be enforced to the prejudice of any creditor or third person, or in such a manner as to do injustice to the debtor himself.* White & Tudor's L. C. in Eq., 4 Am. Ed., Vol. II., part 1, page 205; *Dickson v. Chorn*, 71 Am. Dec., 383 (S. C., 6 Iowa, 19); *Gilliam v. McCormack*, 1 Pickle, 611.

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Now, would it result in *injustice* to the debtor to apply the doctrine in this case? Most manifestly it would. The land has been sold for enough to pay off the mortgage debt, and leave \$1,000 to buy him another homestead. He has done nothing to waive his interest in that surplus; nothing to mislead the complainants or impair their rights. As against them he had a homestead in the land when sold; as against them he has an exemption in the fund, unless they may defeat it by this bill.

Again, the right of a creditor to have the assets of his debtor marshaled is but an equity. It is inferior to the lien of a subsequent registered mortgage, and may be defeated by alienation of the land before bill filed to enforce it. 1 Pickle, 602 and 607.

Can an equity of this kind stand against the prior vested homestead right of the debtor? Will it be enforced, in this case, to the entire destruction of a favored constitutional right, long before acquired and never waived or abandoned by the debtor? Certainly not. When the homestead is once acquired it can be lost only by some act of the claimant which, in and of itself, will work its destruction. No independent act of a creditor can have that effect. If he cannot subject the homestead or its proceeds *directly*, he cannot do so *indirectly*, by forcing another to take it. A court of equity will never destroy the right of home-



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stead for the sake of enforcing the equity here contended for.

In *Gwynne v. Estes* this Court refused to apply the doctrine of marshaling securities so as to defeat the widow's right of dower. 14 Lea, 673.

On principle that case is precisely in point. The widow, in the life-time of her husband, had joined him in a mortgage or deed of trust upon his land, waiving her right of dower. After his death and the foreclosure of the mortgage by sale of the land, she set up a claim to dower in the proceeds. She was held to have waived her right of dower as to the particular debt secured by the conveyance, but not as to the debts of other creditors of her husband. To meet that aspect of the case those other creditors asserted their right to have the securities marshaled, and thereby sought to circumvent the claim of dower.

The Court said this could not be done, though the land had been sold and converted into money; that the widow, being dowable under the statute (Code, M. & V., 3244), in the equitable interest of her husband in the land, was entitled to dower in the surplus proceeds of its sale, and that her right to be so endowed was superior to the equity of creditors sought to be enforced against her.

The same reasoning applies in this case with the same force and justice. The interest of the debtor in the surplus proceeds of the land sold is the same in each case; and while the widow may,

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by statute, have dower in an equitable interest in land, so may the debtor, by similar authority, have homestead in the same character of interest. Code, 2937. The right of dower and the right of homestead are cherished rights. They are alike superior to and will alike prevail against the equitable right of creditors under consideration in this case.

In several cases, where the doctrine of marshaling securities was fully recognized, and would otherwise have been administered in all its force, its application has been refused by the Courts of other States, *because to apply it would be to destroy the right of homestead*. *Dickson v. Chorn*, 6 Iowa, 19; *Marr v. Lewis*, 31 Ark., 203; *McArthur v. Martin*, 23 Minn., 75.

We have not overlooked our own case of *Parr, Nolen & Co. v. Fumbanks*, 11 Lea, 392, nor are we unmindful of the fact that it is in direct conflict with this opinion. In that case the question was fairly presented, and the doctrine here invoked by these complainants was enforced to the destruction of the debtor's right of homestead. But we regard the decision in that case as unsound upon the point just stated, and overrule it to that extent. It has never been followed so far as we are advised. The holding in the case of *Gwynne v. Estes*, 14 Lea, 673, where the claim of dower was allowed to prevail against the effort of creditors to marshal securities, was necessarily a de-

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parture in principle from the Fumbanks' case; so was the reasoning in the still later case of *Gilliam v. McCormack*, 1 Pickle, 598, though neither of the two referred to the Fumbanks case. The fact is that the opinion in the Gilliam case cites approvingly the above Arkansas and Minnesota cases, and upon them, in connection with other authorities, rests the decision of that case. 1 Pickle, 609.

After payment of the mortgage debt and interest and costs of foreclosure, Fulghum is entitled to have \$1,000 of the residue of the fund invested in a new homestead for himself and family.

From the amounts stated in the bill it appears that there will still be something left. The bill may be entertained to subject this balance, and to that extent the decree dismissing the bill will be modified. According to the prayer the bill may be treated as a petition in the cause wherein the mortgage was foreclosed.

Remanded for further proceedings. Two-thirds of accrued costs will be paid by complainants and one-third by Fulghum.

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Turnpike Company v. Hearn.

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## TURNPIKE COMPANY v. HEARN.

(Nashville. February 3, 1889.)

1. EVIDENCE. *Of habit of animal.*

Habit of animal is a continuous fact to be shown by proof of successive acts of similar character.

2. SAME. *Same. Subsequent acts.*

Subsequent acts of similar character are competent to prove fixed habit of animal at a previous date—there being also evidence of conduct of animal at and prior to that date.

Case cited and approved: 8 Allen, 51.

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FROM WILSON.

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Appeal in error from Circuit Court of Wilson County. ROBERT CANTRELL, J.

R. E. THOMPSON, E. E. BEARD, R. P. McCLAIN,  
and JORDAN STOKES for Turnpike Company.

LILLARD THOMPSON, GRIBBLE & McMILLAN, and D.  
O. WILLIAMS for Hearn.

SNODGRASS, J. Hearn sued the plaintiff in error for damages for an injury sustained by him in consequence of being thrown from a buggy while

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Turnpike Company v. Hearn.

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attempting to drive across a small bridge on the Lebanon and Sparta Turnpike. The accident was occasioned by the balking of the horse which he was driving. Hearn averred that the conduct of the horse was attributable to a defect in the bridge.

Among other defenses the company insisted that the accident resulted from the negligence of Hearn in driving improperly an unmanageable horse, or one difficult of control. It offered evidence tending to show that the horse was of such disposition before and after the accident.

The evidence as to the conduct and character of the horse before the accident was admitted, and rejected as to that after the accident; and of this error is assigned.

We are of opinion that the evidence rejected was admissible. The objection that, being afterward, the vicious or unmanageable or timid conduct of the horse may have been occasioned by this fright, and that therefore the evidence must be rejected is not sound. It assumes that the fright was the necessary, provoking cause, which it may or may not have been. This affects the weight, not the admissibility, of the evidence.

It should have been admitted and considered for what it was worth. In a well considered case, decided by the Supreme Judicial Court of Massachusetts, it was held that evidence relating to the habits of a horse subsequent to the accident (where the question involved was the same as here) was

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admissible, and objection to it went to its weight rather than to its competency.

That the habit of an animal is in its nature a continuous fact to be shown by proof of successive acts of a similar kind, and evidence having been first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent, and the result of a fixed habit at the time of the accident. *Todd v. Inhabitants of Rowley*, 8 Allen, 51.

Let the judgment be reversed, and the case remanded for a new trial.

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Rogers v. Stokes.

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ROGERS v. STOKES.

(*Nashville.* February 7, 1889.)

INJUNCTION. *After judgment. Mistake of law.*

Execution of judgment at law will not be enjoined for an alleged error of law, whereby the court rendering it gave an excessive amount of interest.

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FROM WILSON.

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Appeal from Chancery Court of Wilson County.  
GEORGE E. SEAY, Ch.

STATEMENT OF FACTS.

On the 5th day of December, 1859, one Josephus Walker drew a bill of exchange for \$2,500 which became the property of the Planters Bank. On January 28, 1861 the bank recovered judgment for \$2,698.49. Defendants appealed and gave as securities on their appeal bond S. B. Hardy, John L. Clemmons and A. G. Rogers. The Supreme Court affirmed the judgment of the lower court, and gave judgment on December 22, 1865, against the drawer, indorser, and sureties on the appeal bond for the debt, and also interest at 12½ per cent. from the date of the judgment of the lower court, in all

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Rogers v. Stokes.

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\$4,311.85. Execution issued and was levied on the land of S. B. Hardy. The sale of this land paid one-half of the judgment and interest as of November 10, 1868. All the parties were then insolvent except A. G. Rogers. The Planters Bank had also become insolvent and was in the hands of a receiver. Col. Jordan Stokes was the attorney of the bank. Rogers paid Col. Stokes, on account of the judgment, \$500 March 24, 1869; \$450 May 22, 1869, and \$500 May 26, 1870, which were remitted to the bank.

The proof showed that the bank owed Col. Stokes fees for legal services, which Stokes agreed should be retained as a credit on the judgment against Rogers and he would look to Rogers for payment. On October 20, 1875, the assets of the bank were sold, and among them a balance of \$182.59 against Rogers, which afterward became the property of Stokes by purchase. He was thus the owner of the whole debt against Rogers, and on November 23, 1875, they had a settlement in which Rogers executed to Stokes individually his note for \$1,400. Rogers made various payments on this note to Stokes, and on March 1, 1883, they had another settlement in which Rogers executed to Stokes the note now in suit for \$1,715.36, with J. A. and J. W. Rogers as sureties, on which he made one payment. Col. Stokes gave this note to Walter Stokes on April 27, 1885, and on May 5, 1885, suit was brought on it in the Circuit Court. This bill was filed September 11, 1885, to enjoin



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Rogers v. Stokes.

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its collection on the ground of fraud and mistake, alleging that previous to the execution of the \$1,400 note the bank only claimed a balance of \$182.59 on this judgment, as was shown by the sale of its uncollected assets October 20, 1875, and that this was the true amount due; that Stokes knew this fact, and therefore it was a mistake on the part of Rogers to execute the note for \$1,400 on its renewal, and a fraud on the part of Stokes to accept it.

The answer denied all fraud, and stated that Stokes advanced large sums to the Receiver of the bank for Rogers, and if credit was given for them, the balance of \$182.59 sold by the Receiver was correct, but if credit was not given for them then Rogers owed the amount of the note.

Col. Stokes was quite sick when the bill was filed, and died before the proof was taken.

Rogers denied that Stokes made any advancements for him, and much proof was taken on both sides. He also claimed that the Supreme Court had erred in its judgment rendered December 22, 1865, in allowing interest on the judgment of the lower court at the rate of 12½ per cent. instead of 6 per cent., and that if he was given credit for this difference his payments would exceed his half of the judgment and interest. He also claimed that he discovered this error in 1868, after the sale of the Hardy land, and that Col. Stokes agreed to give him credit for it, but that he had forgotten to claim it from Stokes at the time of

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Rogers v. Stokes.

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his different payments and settlements with Stokes, and did not recall the fact until after he was sued on this note in 1885, and had never mentioned it to any one.

The proof showed, however, that Rogers had frequently acknowledged to various parties the justness and correctness of the debt for a period of many years, and stated that but for the kindness of Col. Stokes in indulging him so long he would have been ruined.

The Chancellor dismissed the bill, and complainant appealed.

J. S. PILCHER, E. I. GOLLIDAY, and SAM GOLLIDAY for Rogers.

DICKINSON & FRAZER, STOKES, PARKS & STOKES, and R. P. McCLAIN for Stokes.

TURNER, C. J. The judgment, in part satisfaction of which the note enjoined was given, was rendered by the Circuit Court of Davidson County on January 28, 1861, and affirmed by this Court on December 22, 1865, with interest at twelve and one-half per cent.

It is insisted (as the appeal and affirmance were after the passage of the Act of February 1, 1861, providing "that judgments or decrees, when affirmed in a higher Court, shall be for the judgment or decree of the inferior tribunal, and interest thereon

at the rate of six per cent. per annum instead of twelve and one-half per cent., as now allowed by law.

"SEC. 3. That this Act take effect from and after its passage, and that it expire by its own limitation on the first of July, 1863") that therefore the judgment for the twelve and one-half per cent. is a nullity.

There are several answers to this position. We give but one, which, in our opinion, is conclusive. The Court which rendered the judgment is presumed to have the statutes before it, and to have construed them to award the interest.

The statute reducing interest to six per cent., purporting to have passed on January 25, 1865, really passed January 25, 1866. The Legislature convened on the first Monday in October, 1865. The several Acts immediately preceding and succeeding the Act in question bear date of January 25, 1866, leaving no doubt of mistake in the published date. We will add, the first published Act of that session was passed October 20, 1865. Therefore, the Act cited can have no bearing on the question.

Two notes were executed to the late Jordan Stokes, one in 1875 and one in 1883. the latter being a renewal and the note in suit. In the meantime, as well as subsequent to the execution of the last note, frequent promises to pay were made, even up to a very short time before the institution of suit. The facts fully sustain the

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Rogers v. Stokes.

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decree of the Chancellor, and completely repel the charges of fraud and mistake.

While it was unnecessary for the purposes of this suit, the defendant has very properly introduced leading gentlemen of the pulpit and bar, and triumphantly vindicated the reputation of his deceased father. Opposing counsel, in befitting terms, conceded all that is claimed for his good name. It is not inappropriate for us to say he deserved the reputation he bore with those who have testified as to his high character. The writer knew him socially and professionally for at least a quarter of a century, and for a number of years after had him come before him as an attorney and solicitor in this Court, and has presided with him as a member of this Bench. In every capacity and relation Mr. Stokes gave proofs of integrity and accuracy of thought, of candor and honesty of purpose, and of devotion to right and justice. He was faithful to every trust.

The proof fails to show an agreement to reduce the judgment by the amount of the interest.

Affirmed.

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Chapman v. The State.

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CHAPMAN v. THE STATE.

(Nashville. February 7, 1889.)

CRIMINAL LAW. *Recommendation for pardon of accomplice testifying for State. Supreme Court Practice.*

Recommendation for pardon will not be granted by this Court to an accomplice, who, before sentence on his plea of guilty, had secured an equitable claim to executive clemency by testifying fully and fairly, as witness for the State, on the trial of his co-defendants; where the record fails to show that any application was made or acted on in the lower court, or that the accomplice's equitable claim to clemency was not considered in the mitigation of his sentence to imprisonment on a capital charge.

(See United States v. Ford, 99 U. S., 594.)

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FROM RUTHERFORD.

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Appeal in error from Criminal Court of Rutherford County. G. S. RIDLEY, J.

A. S. MARKS for Chapman.

Attorney-General PICKLE, and PALMER & PALMER for State.

TURNER, C. J. Jointly with S. T. Lands and C. B. Curlee the plaintiff in error was indicted in the

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Chapman v. The State.

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Criminal Court for Rutherford County for the murder of J. M. Bynum.

On the trial of Lands and Curlee plaintiff in error was introduced by the State as a witness. At a subsequent term of the Court Chapman, being arraigned, pleaded "guilty of murder in the second degree." There were verdict and judgment for fifteen years in the penitentiary, and appeal to this Court after matters in arrest of judgment and for new trial were overruled. The entire bill of exceptions is as follows:

"Upon the submission of the cause by the defendant, Chapman, it was admitted by the State that defendant, Chapman, was jointly indicted with Lands and Curlee, and that the cause as to him was continued at the last term of this Court, and that at that term Lands and Curlee were put on their trial, and that defendant, Chapman, was introduced by the Attorney-General as a witness for the State, and that defendant, Chapman, as such witness, detailed all the facts and circumstances of the crime fairly and fully, and that in his interview with the Attorney-General before he was put on the stand as a witness nothing was said to him by the Attorney-General as to whether it would be better or worse for him if he became a witness for the State."

In the conclusion of the judgment and prayer for appeal is the recital: "The defendant insisted that by pleading guilty he did not intend to waive his equitable right to a pardon from the Governor."

It is now argued that while this Court must affirm the judgment, it is nevertheless its duty, under the law, to recommend to the executive for pardon.

In support of this insistence various authorities are cited and relied on. They are to the effect that "an accomplice who is introduced as a witness and testifies to the facts within his knowledge, withholding nothing because of its tendency to self crimination, has an equitable claim to executive clemency, or the solicitor may enter a *nolle prosequi*; but the fact does not constitute a legal defense to a prosecution against him for the same offense."

From this rule it seems the prosecuting attorney may, in his discretion, under the facts of the case, enter a *nolle*, or he may prosecute to the extent allowable under the indictment.

The indictment is for a capital offense. The submission was for one punishable by imprisonment. What the facts were is not disclosed by this record, and it may be the convict has received all the equity he is entitled to in the reduction of the grade of offense and the character of punishment.

We are to presume the Attorney-General of the Criminal Court, knowing the law, and being not forbidden to prosecute for the highest crime, has exercised a sound discretion and equitable leniency in accepting a submission for murder in the second degree.

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Chapman v. The State.

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Upon what principle can this Court hold that full and complete justice has not been done in view of the strongest equity the convict can claim? We know nothing, and can know nothing, of the facts. They may show him to be the only guilty agent in the perpetration of the murder. The Judge of the Criminal Court, who heard the trial of his accomplices, and afterward of himself, makes no recommendation for executive clemency, nor is he asked to do so, and it is beyond the province of this Court to put him in error on a question not made before him. The only questions that can be raised on this record are those in arrest of judgment and on motion for new trial, with nothing to support either. If the facts had been brought to us with a motion to recommend overruled, the result might be otherwise. We decline to recommend. Whatever claim there may be to executive clemency it still rests in the facts unembarrassed by this opinion.

Affirm the judgment.



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King v. State.

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KING v. STATE.

(Nashville. February, 7, 1889.)

1. CRIMINAL LAW. *Custody of jury pending trial. Act 1887, Chapter 158, unconstitutional.*

Act 1887, Chapter 158 providing that, in a certain class of criminal trials, "it shall not be necessary for the presiding Judge to place the jury in charge of an officer, *but the jury may, in the discretion of the Court, disperse, as in other cases,*" is unconstitutional, because it substitutes the Judge's *uncontrolled discretion* for the *rule of law*, and thereby confers upon him legislative power.

(See *Tillman v. Cocke*, 9 Bax. 429.)

2. SAME. *Same. Power of Legislature.*

The Legislature has power, by a proper statute, to authorize the courts to disperse juries in the character of cases mentioned in this Act.

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FROM WILSON.

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Appeal in error from Circuit Court of Wilson County. ROBERT CANTRELL, J.

King was indicted for felonious assault with intent to commit murder in second degree. Upon his trial the jury were at first permitted to disperse without objection. Subsequently, upon his request, they were placed in charge of a sworn officer. He was convicted and sentenced to imprisonment in the penitentiary. He appealed.

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King v. State.

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J. J. TURNER and R. E. THOMPSON for King.

Attorney-General PICKLE for State.

TURNER, C. J. Chapter 158 of the Acts of 1887, passed March 21, 1887, is entitled "An act to change the practice in the Circuit and Criminal Courts of the State in regard to putting criminal juries under the rule," and provides "that in all criminal trials, when the minimum degree of punishment for the crime charged in the indictment is not above one year in the penitentiary, it shall not be necessary for the presiding Judge to place the jury in charge of an officer, but the jury may, in the discretion of the Court, disperse, as in other cases, and the State shall not be chargeable for their board."

This statute does not in terms or by implication repeal the general law requiring juries in felony cases to be placed in charge of an officer and kept apart from other citizens. It undertakes to confer upon each Judge of the Criminal and Circuit Courts the power to suspend the general law, the Judge's discretion being the only rule for his conduct.

The statute before us permits the Judge to have one rule in one case and the opposite rule in another case, in the same county and at the same term of the Court. Under it he may have a discretion to be exercised in one county, and the reverse of that discretion in another county. There

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King v. State.

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is nothing in the Act defining, controlling, or limiting that discretion. He is not required to give or have a reason for its exercise the one way or the other, and therefore, when he says the jury in this criminal case may disperse, and the jury in that criminal case shall go under the rule, the question is settled. Whether he is influenced in the one case by personal considerations for one or more of the jury, or in the other by motives of public policy, can make no difference. He is the sole judge of the question, and his reasons are his own, and there is no authority anywhere to inquire into them.

The statute is a broad conference of legislative power to abolish, suspend, modify, or enforce a general law.

Acting under the authority of this statute, we will necessarily have different rules in different circuits, and in different counties of the same circuit. A statute that cannot be reduced to a general rule to operate in all parts of the State alike is not a general law. To make a general law, it must be so drawn as to be susceptible of one construction as applicable to the entire State.

The discretion, as already said, is for the Judge alone. His determination is the law of the particular case in which he has exercised it, and is not subject to review or revision. The inducement to his action is his individual secret.

Suppose, however, it shall be conceded that he may be reviewed. We ask how are we to inau-

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King v. State.

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gurate the proceedings of review? Nothing has happened at the trial to show an improper exercise of discretion, and therefore no record of the trial can put him in error. Then the question must arise on motion for new trial, supported by affidavits or other testimony of witnesses, with counter testimony, which would make the trial in this Court a departure from the trial in the inferior Court, the only question here being, Was the discretion properly exercised? in which case it would often be attempted to inquire into and impugn the motive of the Judge.

It is the duty of the Legislature to make the law, and of the Courts to enforce. The Legislature cannot say to the Courts, You may enforce the law or not in your discretion, or you may suspend it or not in your discretion.

The general law remaining, it must be enforced in all cases unless the Judge shall, by this statute, be permitted to say, I suspend it. When he makes the order on his minutes to that end he has performed a legislative and not a judicial act—an act the law has not commanded; an act that was not law until he saw proper to declare it so; an act that he may do and undo at will. He may disperse the jury to-day, and put the same jury under rule to-morrow. He is bound to no rule of action, and accountable to no one for his action. He is a legislative and a judicial compound—something not recognized in our institutions.

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Quarles v. Clayton.

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If this had been a general law authorizing the Court to disperse juries in the character of cases mentioned, except upon cause shown for the rule, or cause without qualification, the question would have been different.

Other objections taken to the action of the Court are not sustained.

The statute being unconstitutional, it was error to permit the jury to disperse, and the judgment is reversed.

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(QUARLES v. CLAYTON.

(Nashville. February 12, 1889.)

1. FIRE INSURANCE. *Nature of contract.*

Contract of fire insurance is mere personal indemnity against loss to the person with whom it is made, or those falling within the scope of its provisions.

Cases cited and approved: Hobbs v. Insurance Co., 1 Sneed, 444; 73 N. Y., 447; S. C., 29 Am. Rep., 180; 93 N. Y., 75; S. C., 45 Am. Rep., 176.

2. SAME. *Construction of policy. Loss payable, to whom.*

Under a fire policy upon a dwelling-house, providing that loss should be "payable to the assured, his executors or administrators," and prohibiting any change in title or possession of the property insured, "except by succession by reason of death of the assured," the widow oc-

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 Quarles v. Clayton.
 

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cupying and having a life estate in such dwelling-house, *by virtue of her marriage contract with the assured*, has no interest, legal or equitable, in funds due upon loss occurring after the assured's death. She takes by *purchase*, not by "*succession*."<sup>\*</sup>

*Aliter*, if widow had been entitled to dwelling as homestead or dower.

*Question reserved*: Would *heirs* or *next of kin* take the funds arising from such loss?

Cases cited and approved: *Galyon v. Ketchen*, 85 Tenn., 55; 8 Paige, N. Y., 436; 101 U. S., 436; 112 Ind.; 535 S. C.; 2 Am. Rep., 219.

3. SAME. *Same. Insurer's option to rebuild.*

That the insurance company, having the option, chose to pay the loss instead of rebuilding the premises affords no ground of equity in the widow's favor.

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 FROM RUTHERFORD.
 

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Appeal from Chancery Court of Rutherford County. W. S. BEARDEN, Ch.

JOHN E. RICHARDSON for Quarles.

PALMER & PALMER for Clayton.

LURTON, J. The deceased husband of appellant took out a policy of fire insurance upon his dwelling, loss payable to the assured, his executors, or administrators. Before the expiration of the policy by time, but after the death of the assured, the house was accidentally burned. The insurance com-

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<sup>\*</sup> Could the Insurance Company have availed itself of this conveyance of a life estate in the insured property to defeat this policy?—REPORTER.

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Quarles v. Clayton.

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pany, by consent of the claimants, paid the loss into the hands of the defendant, under an agreement that the fund should be held subject to the legal rights of complainant, if any she had, to be thereafter determined by the courts. An agreed case was made up and submitted to the Chancery Court, and from the decree of the Chancellor Mrs. Quarles has appealed.

Appellant. is the widow of the assured, and claims a life estate in the fund upon the following state of facts:

Before her marriage to the assured a marriage contract was entered into and duly executed in the county of their residence, by which, among other things not material to be here mentioned, it was agreed: "That all the property and estate, both real and personal, now owned or hereafter to be acquired by said John W. Quarles, shall continue to be his, and shall remain wholly unaffected by said contemplated marriage with said Mrs. Nancy M. Kirk, in favor of whom no marital or other rights in his said property and estate shall attach or inure by virtue of said contemplated marriage relation, further or otherwise than is expressed and provided in this instrument, and he hereby reserves the right and privilege of making such suitable provision for her out of his estate as he may at any time desire, either by deed of gift, last will and testament, or otherwise. If he die without making any such provision for her, then she shall, out of his real estate, if she survives him, have a

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comfortable home, to consist of say about one hundred and forty acres of his lands, *in which will be included his dwelling and outhouses*, the same to be surveyed and laid off to her by proper metes and bounds, and in such manner as will be most useful and convenient to her, and with least injury to his estate. This home so laid off to her to be and remain to her own proper use, support, and benefit for and during the term of her natural life, and after her death to take such directions as he may give to it by his last will and testament, or other proper mode of disposing of real estate, and if he die without any will, and without disposing of the remainder interest in said "home" as above provided for and described, then the same shall descend to his proper heirs, and be distributed according to the laws of the State of Tennessee."

After the marriage the dwelling house above described, which was then and after the residence of Mr. Quarles and wife, was insured, under a contract, as before stated, that the loss should be paid to the assured, the husband of appellant, his executors, or administrators.

Mr. Quarles died intestate, and without having made any provision for his widow other than that contained in the marriage contract. The widow continued to occupy the dwelling as her residence until it was destroyed by fire. The portion of the farm of the decedent which was to be assigned to her under the marriage agreement had not at the time of the fire, been laid off by metes and



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bounds, but this was subsequently done to the satisfaction of all concerned. This estate was so laid off, as required by the contract, as to include the outhouses of the assured, and likewise the site of the burned mansion house. The insurance policy was not taken out upon any agreement or contract, express or implied, that she was to have any interest whatever therein.

Under this state of facts, has appellant any equitable or legal interest in the proceeds of this fire policy. That the precise boundaries of the one hundred and forty acres to be laid off to her had not been ascertained by survey at the time of the fire can cut no figure, because it was to be laid off in all events so as to include the mansion house and outhouses. It seems equally clear that she cannot hold the estate of her husband responsible for the value of the house, because at his death her contingent right to the house for her life ripened and became a vested interest for her life, and at the moment her husband died intestate, and without having made any other provision for her, the house was standing, and her right to the use and possession at once accrued. Her interest became at once an insurable interest, and the destruction of the house by any means after her husband's death was not an injury for which his estate or his heirs would be responsible.

Whatever right she had to any interest in this fund must arise from the contract of insurance. The person assured against loss in the policy paid

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upon the premises of Mrs. Quarles was the owner himself. By all the authorities, a contract of fire insurance is a personal contract, and assures the interest alone of the assured in the property, in the absence of some agreement or trust to the contrary. The policy taken out by Mr. Quarles contained the usual provision prohibiting any assignment of the policy without the consent of the insurer. It also contained the further stipulation that the policy should become void "in case any change shall take place in title or possession, *except by succession by reason of death of the assured.*" These provisions have been upheld by the Courts as reasonable conditions, limiting and restricting the liability of the insurer. That they are reasonable is obvious when we consider that the contract is one for the personal indemnity of the assured against a loss affecting his interest in the property covered by the policy. The insurer contracts with reference to the character of the assured for integrity and prudence. He might be very willing to agree to make good the loss of one by the destruction of property owned by him, while he would be altogether unwilling to insure the same property if owned by another. Again, the contract undertakes to make good any loss which the assured may sustain, and from this it follows that if the assured has parted with his interest before the loss, he cannot ask to be indemnified because he has sustained no loss. The provision against change of title is therefore in precise harmony with the per-

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sonal character of the contract. In some fire insurance contracts the stipulation against change of title extends so far as to make the policy void should such change of title be brought about by the death of the assured. The title in such case is no longer in the assured, but has by the law passed to his heirs, or by will to his devisees, and a change of title so accruing has been held to defeat an action for a loss occurring after the death of the assured. *Sherwood v. Agricultural Insurance Company*, 78 N. Y., 447; S. C., 29 Am. Rep., 180; *Hine v. Woolworth*, 93 N. Y., 75; S. C., 45 Am. Rep., 176.

The contract is not therefore one which attaches to or follows the property, being one for the personal indemnity of the assured, and when the insurer does not assent to the assignment of the policy to the grantee of the property, neither the assured, nor his assignees of the property, can recover upon the policy. *Hobbs v. Insurance Company*, 1 Sneed, 444.

But this policy was not annulled by the change of title which occurred by the death of the assured. It expressly provides that a change of title shall defeat the policy, except where it occurs "by succession by reason of the death of the assured." The legal effect of this exception is to continue and extend the policy, notwithstanding the change of title by death of the assured. In whose favor is this continuance? It has been ably argued that the effect of this continuance is in favor of those who,

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by "succession," take the property covered by the risk, and that though it may be payable to the executor or administrator of the assured, yet he will, in case the risk was upon real estate, take and hold in trust for those who, by succession, have taken the property, and who are therefore the persons damnified by the loss. This word "succession," in the connection in which it appears, is a word of technical meaning, and refers to those who by descent or will take the property of a decedent. It is a word which clearly excludes those who take by deed, grant, gift, or any former purchase or contract. This meaning is made more obvious when we consider that the contract provided against *any change* of title except by succession, and to more directly affix a limited and technical meaning, the explanatory words added, "*by reason of the death of the assured.*"

There is much plausibility in the argument that inasmuch as the policy is continued, notwithstanding a change of title has occurred, that in case the risk is upon real estate, that the extension is by intendment of the contract to operate as an indemnity to those who by "succession" have become the owner of the property. In such a case the administrator or distributee would not have any interest to be insured, while the heir or devisee, upon whom the title has been cast, would be the legal and equitable owner and the person to suffer by loss.

The root principle of insurance being that the

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loss is payable only to the extent that the assured had an insurable interest, would seem to preclude the administrator in such a case from any recovery, or make him a trustee for the heir of what he should recover when the loss occurred after the property had passed by "succession" to the heir. This seems to be the holding of the Courts when the question has arisen, although the text-book writers seem not to have seized upon the distinction. *Wyman v. Wyman*, 26 N. Y., 253; *Culbertson v. Cox*, 29 Minn., 309; S. C., 43 Am. Rep., 204. But does the appellant take any interest in the insured property by succession? If she had taken as dowress, or under the homestead laws, she would be within the principle just discussed, and would be within the express holding of the two cases last cited. Unfortunately for this litigation, appellant takes whatever interest she has in the property under the fire policy by virtue of her marriage contract. She is not entitled to homestead or dower, for she expressly agreed to take in lieu of all rights which the law would have given her, the provision which she covenanted for by marriage contract. This interest was a contingent one. It depended upon two events — first, that she should survive her husband; and second, that he should not, by deed or will, make any other provision for her. Both of these events occurred, and instantly upon the death of her husband she became seized of an estate for her life in the insured premises. She therefore took this

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mansion house as the grantee of her husband and did not take it by "succession." But it is insisted that, however she acquires her estate, she has an equitable interest to a life estate in this fund, because it represents the premises which she had a right to occupy and enjoy during her life. This presents a strong case in morals, but her legal rights are not so clear. The rule is well settled that no equity attaches upon the proceeds of a fire policy in favor of third parties who, in the character of grantee, mortgagee, or creditors, may have sustained loss in the absence of some trust or contract to that effect. May on Insurance, Sec. 456; 3 Kent's Comm., 10th Ed., 499.

This rule applies as well to vendors and lienors of every class as to mortgagees who may have had their security impaired by a loss by fire. This Court, in a well considered case, held that the holder of a mechanic's lien upon a building had no equitable lien on a fire policy effected by the owner and assigned to a mortgagee. *Galyon v. Ketchen*, 1 Pickle, 55.

An equity will attach where the vendee or mortgagor was, by covenant or otherwise, bound to insure the property for the better security of the vendor or creditor. In such case the latter would have, to the extent of their interest in the property destroyed, an equitable lien upon the money due on a policy taken out by the mortgagor or vendee, or other debtor who had given a security upon the insured property, and this would be so even

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though the policy stood in the name of the debtor, vendee, or mortgagor. But in the absence of some such agreement the mortgagor, or vendee, or grantee, having an insurable interest, might insure such interest for his own benefit, and no lien would attach thereto in favor of his creditors secured by lien or mortgage, or otherwise, upon the insured property. *Carter v. Rockett*, 8 Paige, N. Y., 436; *Wheeler v. Insurance Co.*, 101 U. S. Rep., 436; *Nordyth v. Gery*, 112 Ind., 535; S. C., 2 Am. Rep., 219; Sheldon on Subrogation, Secs. 233-235.

The agreed state of facts upon which this case is submitted fails to show any covenant, contract, agreement, or understanding, that Mr. Quarles should insure this property for the benefit of appellant. The interest of appellant after the death of her husband was an insurable one; so was the remainder interest of the heirs. The decedent having left no debts, and the distributees being the same persons who take the real estate as heirs, no controversy can arise between the administrator and the remainder-men. That the insurance company had the option to rebuild is urged as a reason why the insurer's election to pay instead of rebuild ought not to operate to the disadvantage of complainant. This option is one common to all contracts of fire insurance, and the agreement, if good in this case, would operate to overturn the well-settled rule that no equity attaches to the proceeds of a fire policy in favor of third persons

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who have suffered loss in the absence of some agreement to that effect. If this option to pay or rebuild should be granted as a sufficient ground to found an equity upon in favor of a third person disappointed by the election of the insurer, the law of insurance would have to be rewritten. There is no privity between appellant and the insurer, and no action of his can be ground to give her an interest which she would not otherwise have.

The decree of the Chancellor will be affirmed.

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BATES v. TAYLOR.

(Nashville. February 16, 1889.)

I. JURISDICTION OF COURTS. *Over mandamus or injunction proceedings against the Governor. Constitutional law.*

The State Courts have not, under our Constitution, jurisdiction of proceedings by mandamus or injunction against the Governor of the State, designed to coerce or restrain him in the discharge, according to his own notions of the law, of his official duties touching the issuance to Congressmen elect of their certificates of election.

The departments of the State Government are independent of each other, and the Judiciary may not thus invade the province of the Executive.

Constitution construed: Art. II., §§ 1, 2.

Code construed: §§ 1094, 1146 (M. & V.); §§ 885, 935 (T. & S.). (See now Acts 1888-9, Ch. —.)

Cases cited and approved: Turnpike Co. v. Brown, 8 Bax., 490.



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Cited and distinguished: *State v. Inspectors*, 6 Lea, 21; 23 Mo., 353; 16 Wall., 203; 92 U. S., 531; 120 U. S., 391; 114 U. S., 314; 109 U. S., 453; 4 Wall., 499; 1 Cranch, 137; 1 Dutcher's N. J., 351-2.

2. SUPREME COURT. *Opinions as authority. Decision. Dictum.*

An opinion of this Court, determining a case upon two distinct and sufficient grounds, is to be treated, when cited as authority, as *decision* on both questions, not as *dictum* on either.

Case cited: *Turnpike Co. v. Brown*, 8 Bax., 490.

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 FROM DAVIDSON.
 

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Appeal from Chancery Court of Davidson County. ANDREW ALLISON, Ch.

VERTREES & VERTREES, HILL & GRANBERRY, and  
A. S. MARKS for Bates.

DEMOSS & MALONE, A. S. COLYAR, and S. WATSON for Taylor.

CALDWELL, J. This is a bill to compel the Governor of the State to deliver a certificate of election to the complainant, and to prevent the issuance of one to another applicant.

Complainant alleges, in substance, that he was elected to membership in the Fifty-first Congress of the United States, in the Third Congressional District of Tennessee, on the sixth day of November, 1888; that the fact of his election was duly ascertained by the Governor and Secretary of State,

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who by law constitute a Board to canvass the returns; that therefore, in further compliance with the law, a certificate showing the fact of his election was made out, signed by the Governor, attested by the Secretary of State, and sealed with the great seal of the State; that after all this the Governor refuses to deliver said certificate to the complainant, and now claims that one H. Clay Evans was elected to said office, and is entitled to receive a certificate of election instead of complainant; and that the Governor is about to issue a certificate to said Evans, though the latter was not elected, and the Secretary of State will not join the Governor in such certificate.

Complainant further alleges that when the said Board acted, and the certificate reciting his election was signed, attested, and sealed the Board's power was exhausted, and complainant's rights became fixed, and his title to the office complete; that the Board could not subsequently reconsider its action and declare another person elected; that in no event had the Governor a right to reconsider the matter himself, and issue a certificate to Evans without the concurrence of the Secretary of State; that the issuance of a certificate to Evans would, in view of the foregoing facts, be a usurpation of authority on the part of the Governor, to the great and irreparable injury of complainant.

The prayer is that the Governor be enjoined from issuing a certificate to Evans, and that he

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be compelled to deliver the one already signed, attested, and sealed to complainant.

The Governor appeared by counsel, and moved the Court to dismiss the bill—

“*First*—For want of equity on the face of the bill.

“*Second*—For want of jurisdiction in the Court.

“*Third*—Because it is unfit for a court of equity.”

The Chancellor sustained the motion, and dismissed the bill.

Complainant has appealed.

The main question debated at the bar, and that which is conclusive of the case, is one of jurisdiction.

The Constitution ordains that the Governor of the State shall perform certain duties therein prescribed, and such others as may, from time to time, be devolved upon him by Act of the Legislature. Art. III. .

Among the duties so devolved upon him by statute is that of issuing a commission or certificate of election to each person elected Representative to Congress. Code (M. & V.), §§ 1094 and 1146.

The issuance of such commission or certificate, whether called a ministerial or an executive duty, is an official action, whose performance can be neither coerced nor restrained by the Courts.

An attempt on the part of the Courts to control his action under this statute would be an in-

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vasion by one department of the Government of the rights of another department, and, for that reason, a violation of Sections 1 and 2 of Article II. of the Constitution, which are in the following language:

"Section 1. The powers of the Government shall be divided into three distinct departments—the legislative, executive, and judicial.

"Section 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

Art. II.

It is well settled by all the authorities that *mandamus* will not lie to compel the Governor of a State to perform duties of a purely executive or political nature, involving the exercise of official judgment or discretion; but the decisions are wide apart as to the power of the Courts to compel him to discharge those duties which, as to other officials, are usually called ministerial.

The Courts of Ohio, Alabama, California, Maryland, and North Carolina are together in holding that the Governor may be required by *mandamus* to perform duties of the latter class; while the Courts of Arkansas, Georgia, Illinois, Louisiana, Maine, Minnesota, New Jersey, and Rhode Island have uniformly held the contrary, upon the ground that the powers of government in the States are distributed among three departments, which, under the organic law, are to be and re-

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main independent of each other. High on Extraordinary Legal Remedies, Secs. 118, 119, 120, and 121.

This author cites the cases from the different States mentioned. We have examined them, and also a very instructive case from Michigan (*Sutherland v. The Governor*, 29 Mich. 321), which is in accord with those from the States last mentioned, and we are fully persuaded not only that the weight of authority, but also the weight of reason is against the power of the Courts to coerce the chief executive of a State into the performance of any official duty.

This Court has heretofore put itself in line with those Courts denying the existence of such power. *Turnpike Co. v. Brown*, 8 Baxter, 490.

In that case the turnpike company sought, by *mandamus*, to compel Governor Brown to issue certain bonds of the State, which it claimed the Legislature had directed to be issued by the Governor. The relief was refused upon two grounds: *First*, because the company had not shown itself entitled to the bonds; and, *secondly*, because the Court had no jurisdiction to control the action of the Governor with respect thereto.

In combating the idea that the Governor might be compelled to perform a ministerial duty, the Court, speaking through Judge McFarland, said:

\* \* \* "The Governor holds but one office—that is, the office of chief executive. Any duty which he performs under authority of law is

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an executive duty; otherwise we would have him acting in separate and distinct capacities. In some respects he would be the chief executive, an independent department of the Government; as to others he would be a mere ministerial officer, subject to the mandate of any Judge of the State; and we must assume also that the Judge would have the power to imprison the Governor if he refused to obey the order; for if the Court has this jurisdiction the power to enforce the judgment must follow." 8 Baxter, 493. The jurisdiction was denied upon the ground that the Courts had no right to interfere with the Governor, who was the head of another department of the Government, in the discharge of a duty by law devolved upon him.

But it is now argued that so much of the opinion in that case as relates to the question of jurisdiction was *obiter dictum*, because the question decided in an earlier part of the opinion was conclusive of the case. This cannot be so. Both questions were fairly raised by the record, and the fact that the question of jurisdiction was discussed last does not make it any the less entitled to the force of an adjudication.

It is further contended that this Court disregarded and overruled that part of that decision by taking jurisdiction of a *mandamus* proceeding against Governor Marks in the later case of *The State, ex rel. v. Board of Inspectors*, 6 Lea, 21. The question of jurisdiction was expressly reserved

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in that case, for the reason, as stated in the opinion, that the Governor had in his answer declared his willingness to submit to the direction of the Court. Whether jurisdiction of the *person* in such a case can properly be conferred in that way is not material in this case. The question does not arise here. It did arise there, and that the Court exercised all the power of jurisdiction—whether rightfully or wrongfully—can neither affect the present case nor impair in any degree the authority of the Brown case. Jurisdiction was taken in Missouri (*Railroad v. The Governor*, 23 Mo., 353) upon a similar expression from the Governor, while in Michigan it was refused. 29 Mich., 322.

We have no hesitation in holding that the Courts have no jurisdiction to compel the Governor to deliver to complainant the certificate claimed by him. No more have they the power to restrain him from issuing a certificate to the other applicant. If the Governor cannot be compelled by *mandamus* to deliver a certificate of election to one person, it follows that he cannot be restrained by injunction from delivering it to another person, for the nature of the act to be performed by him is precisely the same in one case as in the other, and the same considerations operate to defeat the jurisdiction of the Courts in both instances.

But conceding, for the sake of argument, that the Governor could not, *in the first instance*, have been compelled to give the certificate to complain-

ant, or prevented from giving it to Evans, the very able and learned counsel of complainant go further, and insist, with great force and plausibility, that the chief executive of a State *may be* enjoined from doing an *unlawful* thing; that under the facts disclosed in the bill the act sought to be restrained is *unlawful*, and that, being *unlawful*, its performance may be prevented by injunction.

The essence of these facts is that the Governor and Secretary of State together reached the conclusion, from the returns, that complainant had been elected, and thereupon prepared, signed, attested, and sealed a certificate showing that fact, and that before the delivery of that certificate the Governor changed his mind, decided that Evans was elected, and, without the concurrence of the Secretary of State, was about to issue a certificate to Evans when this bill was filed.

The statute devolving upon the Governor the duty of issuing a commission or certificate of election necessarily confers upon him the right of determining when and how that duty, within the law, must be performed; and when he comes to do the thing required he must be allowed to do it according to his own judgment as to the meaning of the law, and on his own sense of official responsibility under his oath. In other words, it is his province to construe the statute for himself, and to determine for himself when he has complied with all of its requirements, and when there yet remains something for him to do—whether he



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may act alone under a given state of facts, or must act in conjunction with another; and so long as he acts in good faith and with an honest purpose of discharging his duty under the law his action cannot appropriately be characterized as *unlawful*. In such case the Courts have no power to substitute their construction or judgment for his, and tell him when to stop or when to go on.

If they have such authority as to one statute imposing an obligation upon him, they have it as to all such statutes, and with respect to all requirements made of him by the Constitution as well. Such a view would put the responsibility of the Governor's office upon the judiciary, and virtually make him subject to the direction of the Courts in every action he might take, thereby making a substantial destruction of one department of the State Government, and a usurpation of its functions by another, contrary to the genius, spirit, and letter of the Constitution.

If the Governor act corruptly he is amenable to the Legislature; and if, in an honest endeavor to discharge his duty, he mistake the law, and prejudice individual rights, the injured person may, in proper cases, restrain the one benefited from using his advantage.

Let us illustrate the connection, and at the same time the independence, of the three departments of the Government: The Legislature should never pass nor the Governor approve an unconstitutional law. Yet, because the duty of enacting laws rests

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upon the one, and that of approving or disapproving them upon the other, the Courts cannot restrain the former from passing nor the latter from approving a statute obviously unconstitutional. While acting in their own appropriate spheres the Legislature and the Governor must be allowed to judge of the constitutionality of the law for themselves. After they have acted the judiciary may act, and, at the suit of some interested party, annul the law because violative of the Constitution. Thus the integrity and independence of each department are preserved, conflict between them is prevented, and the injurious operation of an unconstitutional law is averted.

We do not think the decisions of the Supreme Court of the United States stand in the way of the conclusion we have reached, though the Federal Courts have, in several instances, taken jurisdiction of proceedings against the Governors of certain States, and put them under restraint by injunction.

In *Davis v. Gray*, 16 Wallace, 203, Governor Davis, of Texas, was enjoined from wrongfully issuing patents to land which had previously been granted to other persons. The Governor of Louisiana was restrained from issuing bonds under an unconstitutional act, in the case of *Board of Liquidation v. McComb*, 92 U. S., 531. In another case the Governor of Missouri, and others acting with him, were, by injunction, prevented or restrained for a time from selling certain property

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to enforce statutory mortgage liens claimed by the State, the claim by the adverse party being that the liens had been satisfied. *Ralston v. Missouri Fund Commissioners*, 120 U. S., 391.

The Davis case was cited approvingly in *Allen v. Railroad*, 114 U. S., 314, and in *re Ayres*, 123 U. S., 506, while it was questioned and limited in *Cunningham v. Macon & Brunswick Railroad Company*, 109 U. S., 453.

Now, the most that can be said of these cases is that they show the jurisdiction of the *Federal Courts* to restrain the Governor of a State from doing a wrongful act to the injury of individual rights. It is not even intimated in any one of them that the *State Courts* have any such jurisdiction. There is a wide difference between the relation of the *Federal judiciary* and the *State judiciary* to the Governor of the State, and, because of that difference the Federal decisions referred to are not at all in point in this case. A State's judiciary sustains the same relation to its Governor that the Federal judiciary does to the President of the United States; and as a State Court, by reason of that relation, has no jurisdiction to coerce or restrain the Governor with respect to his official duties, so the Federal Courts, for the same reason, have no power to interfere with the official actions of the President. It was so held in the case of the *State of Mississippi v. Johnson*, 4 Wallace, 499. In that case the State of Mississippi, as party complainant, sought, by injunction, to restrain Pres-

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ident Johnson from the execution of the Reconstruction Acts of Congress, upon the allegation that they were unconstitutional. The Court held that it had no jurisdiction either to compel the President to execute constitutional laws or to restrain his action under unconstitutional legislation.

The reasoning of the Court is embraced in the following quotation from the opinion of Chief Justice Chase, who spoke for the whole Court:

"It will hardly be contended that Congress (*the Courts*) can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right of Judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished in principle from the right to such interposition against the execution of such a law by the President? The Congress is the legislative department of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are in proper cases subject to its cognizance. The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

"Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience it is needless to say that the Court is without power to enforce its process. If, on the other hand, the President complies with the order of the Court, and refuses to execute the Acts of Congress, is it

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not clear that a collision may occur between the executive and legislative departments of the Government? May not the House of Representatives impeach the President for such refusal? And in that case could this Court interfere in behalf of the President thus endangered by compliance with its mandate, and restrain, by injunction, the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this Court to arrest proceedings in that Court? These questions answer themselves." 4 Wallace, 500 and 501.

The case of *Marberry v. Madison*, 1 Cranch, 137, is not in conflict, and could not be, for the President was not a party.

It may be of some interest, and not inappropriate at this point, to note the fact that an unseemly conflict was narrowly escaped in that case, though the proceeding was not against the President himself, but only against a member of his Cabinet.

Chief Justice Green, of New Jersey, says:

"We have Mr. Jefferson's authority for saying that if the Supreme Court had granted a *mandamus* in the case of *Marberry v. Madison* he should have regarded it as trenching on his appropriate sphere of duty; that he had instructed Mr. Madison not to deliver the commission, and that he was prepared, as President of the United States, to maintain his own construction of the

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Constitution with all the powers of the Government against any control that might be attempted by the judiciary in effecting what he regarded as the rightful powers of the executive and Senate within their peculiar departments." *The State v. The Governor*, 1 Dutcher's N. J. R., 351-2, citing Jefferson's Works, Vol. IV., pp. 75, 317, 372.

The question of jurisdiction being conclusive, it has not been deemed important to decide whether, under the peculiar language of the statute, the delivery of the certificate made out for the complainant was necessary to invest him with a title to the office, nor whether, after the signing, attesting, and sealing of that certificate, the Governor could rightfully reconsider his action, and, without the concurrence of the Secretary of State, issue to Evans a certificate. But if the law be, as claimed in the bill and in the argument, that what was done with respect to the first certificate gave complainant a complete title and exhausted the power of the Governor, and that he could properly act only in conjunction with the Secretary of State, then, of course, a subsequent certificate by the Governor to Evans would neither confer title upon him nor impair the title of complainant, and there would be no sufficient reason for seeking the aid of a court of equity.

Let the decree be affirmed and the bill dismissed at the cost of complainant.

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 Collins v. Boyett.
 

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## COLLINS v. BOYETT.

(Nashville. February 16, 1889.)

HOMESTEAD. *Abandonment. Removal of husband and wife.*

Under Act 1870, Ch. 80, the removal of husband and wife from premises occupied as homestead after conveyance thereof by the husband without the wife's joinder, does not operate to defeat the wife's homestead right therein, no other homestead having been acquired after such removal.

"*The wife cannot be thus compelled to elect between her husband and homestead.*" (See now Acts 1879, Ch. 171.)

Constitution cited: Art. XI., § 11.

Act construed: Act 1870 (Second Session), Ch. 80 (Code § 2114a, T. & S.).

Case cited and overruled, *Levison v. Abrahams*, 14 Lea, 336.

Cited and approved: *Roach v. Hacker*, 2 Lea, 634; *Wade v. Wade*, 2 Leg. Rep., 10; *Williams v. Williams*, 7 Bax., 118; *Neam v. Campbell*, 1 Leg. Rep., 28; *Mosh v. Russell*, 1 Lea, 544; *Richards v. Smith*, MSS. (1881); *Jarman v. Jarman*, 4 Lea, 675.

(See 86 Tenn., 660, disapproving *Jarman v. Jarman* and citing approvingly *Parr v. Fumbanks*, 11 Lea, 398, since overruled in *White v. Fulghum*, ante p. 281.)

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 FROM MARSHALL.
 

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Appeal from Chancery Court of Marshall County,  
W. S. FLEMING, Ch.

On March 15, 1873, complainant and her husband occupied the lands in controversy as their homestead. At that date the husband sold the

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lands and conveyed same without the wife's joinder in the deed. Subsequently they removed from the premises. The purchaser took possession and paid the purchase price in full. In 1883, after the land had been transferred by the original purchaser, the wife brought this bill against her husband and those claiming the lands under his deed to recover her homestead therein. Complainant had acquired no homestead subsequent to her removal.

The Chancellor dismissed the bill.

Complainant appealed.

JONES & MURRAY and W. W. WALKER for Collins.

J. H. LEWIS for Boyett.

TURNER, C. J. Section 11, Article XI., of the Constitution ordains: "A homestead in the possession of each head of a family, and the improvements thereon, to the value in all of one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same; nor shall said property be alienated without the joint consent of husband and wife, when that relation exists."

Section 2114a of the Code, after providing the homestead, enacts: "That said real estate shall not be alienated without the joint consent of the hus-



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band and wife, when that relation exists, to be evidenced by conveyance duly executed as required by law for married women."

In this case the land was sold by the husband in November, 1873; the bill filed by the wife for homestead in April, 1883. At the end of twelve months after the sale the husband and wife removed from the premises, and have owned no other homestead.

The proof is conflicting as to whether the wife gave her oral consent to the sale, the parties affirming and denying, supporting their theories with equal vigor.

In our opinion it is immaterial which is right as to the fact. The wife not having signed the deed and been privily examined, no other consent will deprive her of her homestead. It is argued that the removal of the wife with her husband was an abandonment of the right, and in support of this *Levison & Co. v. Abrahams*, 14 Lea, 336, is relied on. That case does sustain the contention, but it is unsound and not in accord with reported decisions of this Court. The wife cannot be thus compelled to elect between her husband and homestead. It cites several cases to justify it. The first is *Henry v. Wilson*, 9 Lea, 178. In that case the husband left the wife and went to Kentucky, declaring his intention never to live with his wife again, and filed a petition in Kentucky for a divorce. About a year after his desertion the wife removed to Dyer County, leaving the

homestead vacant. This was a voluntary abandonment, uninfluenced by a purpose to be with her husband.

In *Roach v. Hacker*, 2 Lea, 634, the wife left the homestead after the husband had gone to Kentucky, and her bill to recover homestead "goes upon the idea that the husband deserted his wife and does not intend to return."

In *Jarman v. Jarman*, 4 Lea, 675, it is said: "By our law the homestead vests in the husband and wife jointly, and is a life estate. Upon the death of either it vests in the survivor. Neither has the right to dispose of it except with the consent of the other, by will or otherwise, and then only in the mode prescribed by statute. The right of the wife is fixed during coverture, and is only lost by her voluntary alienation or abandonment, or by her death." There was nothing in the case calling for the use of the words "voluntary abandonment," and therefore they were not defined.

*Wade v. Wade*, 2 Legal Reporter, 10, simply holds that the land claimed as a homestead was not used or occupied as such, had no dwelling-house upon it, and therefore there was no right of homestead in it.

So that the case of *Levison & Co. v. Abrahams* is not sustained in any particular by the cases it cites.

In *Williams v. Williams*, 7 Baxter, 118, Chief Justice Nicholson says:

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"It is now a rule of property, made permanent by the fundamental law, that every head of a family is deprived of the right to alienate the homestead unless his wife joins in the conveyance. It follows that such conveyance is absolutely void, and communicates no title to the purchaser, so far as it abridges or interferes with the wife's homestead right; and the wife, by her next friend, has such an interest in the preservation of the homestead as entitles her to invoke the protection of a court of chancery, by bill *quia timet*, to have the cloud upon her rights removed, and her homestead rights declared."

In *Neam v. Campbell*, 1 Legal Reporter, 28, Judge McFarland said:

"We have held that a wife is not to be deprived of this right (homestead), although the husband, during his life, moved away from the land with her and his family. She may afterward assert her right and be restored to possession," citing *Carter v. Natham et al.* and *Williamson v. Wood*, MS. He proceeds: "The homestead exemption is not an estate in the land, but a mere exemption, and when the widow voluntarily abandons the possession her right is gone (*Hick v. Pepper*, MS.); but not so where she was moved from the premises by her husband."

In *Mash v. Russell*, 1 Lea, 544, Judge Cooper says: "The land being in the actual occupancy of the husband and wife as a homestead at the date of the conveyances, those conveyances did not carry

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the homestead right secured by the Constitution and the Act of the Legislature to carry it into effect. That right could only be alienated under such circumstances by the joint consent of the husband and wife, 'evidenced by conveyance duly executed as required by law for married women'—that is, by privy examination of the *feme*."

In an unpublished opinion of Special Judge E. H. Ewing, in *Richards, by next friend, v. Smith*, found in Opinion Book of 1881, at page 318, it is said: "Homestead, as above defined, is property, and must be passed as provided by the Constitution and statute, and but one mode is allowed.

\* \* \* There must be a writing to pass a man's lands, signed by him. Nothing else will pass his lands.

"The wife's 'disabilities which restrict her are equally a shield for her protection. The makers of the Constitution doubtless looked well in this provision to the peculiar relation of husband and wife. They could well foresee that many cases would arise when the conduct of a reckless and besotted or tyrannical husband might drive a woman to shifts, and concealments even, that would not bear the scrutiny of a strict morality, and thought that at least she should have that protection which comes from the solemnities of a deed and privy examination.'

"The husband undertook to sell the homestead, the wife not joining. He removed after the alien-

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ation, and took his wife with him. The deed as to her right in the homestead was void."

There was no break in this line of decisions till *Levison & Co. v. Abrahams* appeared. If it is to stand it overrules quite a number of well considered cases adhering to the Constitution and enabling statute, from both of which it is a departure. It is therefore overruled.

The decree of the Chancellor is reversed, and the cause remanded for assignment of homestead and an account for rents from the filing of the bill. Defendants will pay costs.

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Ligon's Administrators v. Insurance Company.

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## LIGON'S ADM'RS v. INSURANCE COMPANY.

(Nashville. February 23, 1889.)

1. FIRE INSURANCE. *Waiver of preliminary proofs of loss.*

Condition in fire policy that insured shall "render a particular account of the loss" "as soon thereafter as possible," is waived, where insurer, after notice of loss, proceeded at once, with co-operation of the insured, without demanding or waiting for the preliminary proofs, to ascertain for himself the full details of the loss, and proposed settlement thereof, which failed only by reason of disagreement as to amount.

2. SAME. *Waiver of defects in preliminary proofs of loss.*

When preliminary proofs of loss are furnished by insured defects therein are waived, unless they shall be promptly and specifically pointed out by the insurer so as to afford an opportunity for correction.

Objection that they are "incomplete, unsatisfactory and not in accordance with printed conditions of policy," is too vague and general.

3. SAME. *Waiver of plans and specifications of building.*

Condition in fire policy that insured shall furnish, as part of preliminary proofs of loss, plans and specifications of the building damaged or destroyed, "*if required so to do*," is waived, where the insurer procured for himself "plans and specifications of building" with insured's knowledge and co-operation, and made no demand for same until after insured had furnished the preliminary proofs of loss, or they had been waived by the insurer.

Cases cited and approved: 1 Green (N. J.), 110; 49 N. Y., 389; 66 Penn. St., 9; 28 Gratt., 88; 52 Me., 492; 12 Gray, 265.

Cited and distinguished: 60 Miss., 302.

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FROM WILSON.

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Appeal in error from Circuit Court of Wilson County. ROBERT CANTRELL, J.

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*Ligon's Administrators v. Insurance Company.*

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Suit by Ligon's Administrators, upon a fire insurance policy held by their intestate in the defendant Company, to recover for loss of the insured property—a livery stable.

The material matters of defense were that the insured had failed to comply with the conditions of policy with reference to furnishing preliminary proofs of loss to the insurer.

Among the conditions contained in the policy are the following:

1. "Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the Company, and as soon thereafter as possible render a particular account of said loss," etc.

2. "As a part of the preliminary proofs of loss the assured shall, if the claim be for building damaged or destroyed by fire, if required so to do, furnish the Company with plans and specifications of the building destroyed or damaged, which shall be duly verified by the oath of the assured."

The insured insisted that, if there had been any failure or defects in the matter of furnishing preliminary proofs of loss, the Company had waived it by its acts and conduct.

The judgment below was in favor of defendant. The plaintiff appealed.

SANDERS & EASTMAN for Ligon's Administrators.

B. J. TARVER and SAM GOLLIDAY for Insurance Company.

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Ligon's Administrators v. Insurance Company.

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FOLKES, J. This is an action upon a fire policy for one thousand dollars, issued by defendant upon a building, the property of plaintiffs' intestate. It was tried by the Circuit Judge without the intervention of a jury, and judgment rendered in favor of the defendant.

Plaintiffs have appealed, assigning errors.

The defendant interposed three defenses, which, briefly stated, are as follows:

*First*—Want of title in plaintiffs' intestate to the property.

*Second*—Other insurance in excess of the amount permitted in the policy.

*Third*—Prematurity of suit and non-liability, by reason of the failure of the plaintiffs to furnish proper preliminary proofs of loss, and plans and specifications of the building destroyed, as required by the ninth clause of the policy.

The Court found in favor of the plaintiffs upon the first and second pleas, and there is ample proof to sustain such finding.

Upon the third plea the finding was in favor of defendant, the Court being of opinion that the plaintiffs had failed to furnish the "proof of loss," and the plans and specifications required by the terms of the policy.

In this there was manifest error. It is unnecessary to quote the exact terms of the ninth clause of the policy, as the case does not turn upon any peculiarity of phraseology, the clause being the usual one in fire policies, requiring such proof as



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a condition precedent to the bringing of suit on the policy.

Such stipulations are eminently proper, and should be sustained, and are by the Courts upheld; but, being a provision for the benefit of the insurance company, can be waived by the latter, and will be held by the Courts as waived where the conduct of the company has misled, and was such as might well have misled a reasonably prudent man, or where it is manifest that the company had already been put in possession of all the information that said clause was intended to furnish, and made no request for more specific details until after the lapse of an unreasonable time, leaving the insured to suppose that no further demands would be made.

The facts necessary to be stated are as follows: The building was burned on the 15th of May, 1887. The company was promptly apprised of the fact, and in a few days thereafter the adjuster of the company visited the city of Lebanon, where the property had been located, and had repeated interviews with the plaintiffs; and, after having been requested by the adjuster to do so, the plaintiffs furnished a reliable carpenter and builder to make plans and specifications of the building destroyed, with an estimate of the cost of replacing same.

This contractor, when called on by the agent and adjuster, declined, for personal reasons, to make such plans and estimate.

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The adjuster then came to Nashville, the home of the company, and procured the services of a contractor of his own selection, and returned with him to Lebanon. This contractor then made out specifications and an estimate, showing minutely the amount and character of material destroyed, value, cost, and the like. The plaintiffs had proposed to the adjuster to select a contractor themselves, who should act in conjunction with the contractor brought there by the company. The adjuster declined this, saying that he preferred the contractor selected by him to make the specifications and estimate by himself.

After these specifications had been thus made out by the adjuster selected by the company, the latter proposed to settle the loss by paying its share thereof, being one-half, there being another policy upon the same property for the same amount.

The parties were unable to agree, the principal difficulty being in the estimate made by the adjuster's contractor of the degree and extent of injury to the brick walls that were left standing. The adjuster thereupon returned to Nashville.

On the 22d of June, 1887, the plaintiffs, being unable to obtain any thing satisfactory from the company, made out and transmitted by mail formal "proofs of loss" in accordance with their understanding of the requirements of the ninth clause of the policy, duly sworn to, and with the cer-

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tificate of magistrate, etc., as designated in the policy.

On the 29th of June the company, through its secretary, returned the following reply:

"We are in receipt of what purports to be proofs of loss under our policy No. 52940, issued to A. L. Ligon, deceased.

"We hereby return the said proofs as incomplete, unsatisfactory, and not in accordance with the printed conditions of the policy. We require, according to the ninth condition of our policy, full and detailed specifications and plans of the building we insured, and an estimate of the cost of repairing the same by a competent and reliable builder and contractor, as well as an allowance for the difference between old and new.

"We most positively deny any claim against the company other than the damage and loss to the building we insured under said policy. If there was, as you claim, an insurance of \$2,500 on the building insured by said policy, then our policy is void by reason of over-insurance, our policy giving the privilege of only \$1,000 additional insurance."

In relation to this letter it is sufficient to say that, so far as it concerns any supposed infirmities in the preliminary "proofs of loss" as made out and sent by plaintiffs, it is inoperative by reason of the fact that such proofs are a substantial compliance with the requirements of the policy;

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and if defective the company should have pointed out wherein they were insufficient. The objections thereto are too vague and general, even if the plaintiffs were under any obligation to furnish formal proofs of loss, after what had taken place between the parties. It must be borne in mind that under the terms of the policy referred to preliminary proofs of loss are to be furnished without request, while as to plans and specifications of the building destroyed, they are to be furnished "if required so to do."

That portion of the letter which relates to and "requires full and detailed specifications and plans of the building," cannot be now regarded as the "request so to do" contemplated by the policy (the object of which was to furnish such information to the company), for the reason that this condition is to be held as waived by the conduct of the company, through its adjuster, as herein already fully narrated. To allow the company to make such demand, after having been, with the plaintiffs' knowledge and co-operation, already placed fully in possession of all that was needed for the end in view, would be to permit the plaintiffs to be misled and delayed by the defendant into fancied security and loss of time in the assertion of their legal rights.

Moreover, it is by no means clear that so much of the letter as denies liability on the policy, by reason of assured's over-insurance, would not in and of itself operate to dispense with all prelimi-

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nary proofs of loss and specifications, independent of the matters above referred to as constituting a waiver.

Under well-settled principles such certainly would be its effect if it were an unqualified denial of liability on the policy by reason of over-insurance or other defense going to validity of the policy. It is probable, however, that the denial of liability is made conditional upon the assumed claim of plaintiffs of \$2,500 insurance on the building.

Be this as it may, and without deciding the last point suggested, we are of opinion, and so adjudge, that the defendant company has, by its conduct, as herein set out, waived the performance of the stipulations with reference to any further proofs and specifications.

See *Ronmage v. Mechanics' Fire Insurance Company*, 1 Green (N. J.), 110; *Badger v. Glenn's Falls Insurance Co.*, 49 N. Y., 389; *Beatty v. Lycoming Insurance Co.*, 66 Penn. St., 9; *Georgia Insurance Co. v. Kinnier*, 28 Gratt., 88; *Lewis v. Monmouth Mutual Fire Insurance Co.*, 52 Me., 492; *Blake v. Erchange Mutual Insurance Co.*, 12 Gray, 265; May on Insurance, Secs. 461, 468, 469, 473.

The case of *Insurance Companies v. Sorsby*, 60 Miss., 302, relied on by defendant is not considered in the way of the conclusions we have reached. It resembles the case at bar in some respects, but it differs from it in this, that the additional proof demanded under the terms of the policy doubtless related to invoices, etc., concerning the stock of

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goods burned, information in relation to which had not necessarily been obtained by the company from the visit of its agent at the scene of the loss and the examination then made of the assured touching the loss.

Here the information concerned the building merely, and the specifications obtained shortly after the fire contained all available information in relation thereto. By contenting ourselves with pointing out the one difference between the case at bar and this Mississippi case, we do not wish to be understood as approving nor criticizing the decision in the latter case.

Reverse the action of the Circuit Court, and enter judgment here for the full amount of the policy, with interest.

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Grissom v. Bank.

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GRISSOM v. COMMERCIAL NATIONAL BANK.

(Nashville. February 23, 1889.)

1. BANKS. *Authority to pay depositor's note. Not presumed when.*

The fact that a note is made payable at a bank does not, without more, confer authority upon the bank to pay the note, when due to and presented by a third person, out of funds standing, on deposit, to credit of the maker, at maturity of note.

Cases cited and approved: McGill v. Ott, 10 Lea, 147; Bynum v. Apperson, 9 Heis., 638; Lane v. Bank, 9 Heis., 436; 15 Vroom, 638 (S. C., 43 Am. Rep., 167); 41 Ill., 267; 109 Ill., 479; 60 Ind., 160; 132 Mass., 151; 34 La., 604; 32 Mo., 191; 29 Mich., 9.

Cited and discussed: 9 Cranch, 9; 46 N. Y., 82; 80 N. Y., 106; 105 Penn. St., 496; 55 Iowa, 75, and other cases.

2. SAME. *Same. Custom.*

Custom, to authorize such payment, must be general, uniform and certain, and known to both parties. They are presumed, in such case, to contract with reference to such custom.

Cases cited and approved: Dabney v. Campbell, 9 Hum., 686; Saint v. Smith, 1 Cold., 52; 15 Hon., 545.

3. SAME. *Set-off. Estoppel.*

Where a bank has without authority paid note on which its depositor is accommodation indorser, it is estoppel to claim such payment as a set-off against the depositor, where, by reason of the bank's failure to give notice of the payment, the indorser is deprived of effectual recourse against his principal.

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FROM DAVIDSON.

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Appeal from Chancery Court of Davidson County.  
ANDREW ALLISON, Ch.

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Grissom v. Bank.

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STOKES, PARKS &amp; STOKES for Grissom.

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CHAMPION & HEAD for Bank.

FOLKES, J. This is a bill brought by complainant to recover of the defendant the sum of one thousand dollars, claimed as a balance due after crediting the bank with all checks drawn against sundry deposits made therein by the complainant as a customer of the bank.

The defendant interposes two defenses. It admits that between May 1, 1886, and July 27, 1887, the complainant made deposits with it in sundry sums, aggregating \$5,134.05, but says that it has paid out the same, for and on account of complainant, upon sundry checks, except as to \$1,000, which it says was paid upon and in discharge of a note of complainant for that amount, made and dated at Nashville, March 26, 1887, and payable sixty days after date, to the order of J. D. Carter & Co., at the *Commercial National Bank*, Nashville, endorsed by J. D. Carter & Co., and by Jno. F. Wheless, the latter of whom, as the owner and holder thereof, placed the same in the Fourth National Bank of Nashville for collection. That on May 28, the last day of grace, the note was, by the Fourth National Bank, presented for payment at the defendant's banking house, where it was marked "good" by defendant, and was, on May 30th, paid by defendant to the Fourth National Bank, and the amount thereof charged up to complainant in the same



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manner as though it had been a check drawn by complainant. •

It claims that it was, and is, the custom of the banks in Nashville, where notes are made payable at a particular bank, to pay such notes when the maker has sufficient funds to his credit for that purpose, without instructions, and to charge the same to the general account of the maker.

It also insists, that independent of custom, it has the right to treat a note so made as the equivalent of a check, and as a direction, therefore, on the part of the maker, to pay same on his general account as a depositor.

The Chancellor found both defenses in favor of the bank, and dismissed the bill.

Complainant has appealed, assigning errors.

We will consider first the matter of custom.

The defendant introduces the testimony of the officers of four banks in the city of Nashville, who say that such a custom, with certain modifications and variations, prevails at their respective banks, and, so far as they know, at the banks in the city generally. But these witnesses are not agreed as to the manner of exercising the usage. Mr. Porterfield, of the defendant bank, says it is the custom with his bank to pay such notes, unless on their face they appear to have been given for land, in which event they are not paid.

Mr. Williams, of the First National Bank, says that while the habit of his bank was to pay such notes, they did not pay land notes, nor where

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there was "some complication" about them. Mr. Keith, of the Fourth National Bank, proves that it was the custom of his bank to pay such notes, and that he knows of no exceptions to the rule, although his bank may have made some. Mr. Jones, of the American National Bank, says that it is the custom with his bank to pay such notes if given by mercantile men, but where given by men not so engaged they ask for instructions before paying; and that, immediately upon paying a note under the usage referred to, his bank always gave written notice to the depositor that such payment had been made. If the custom of this last bank, as to giving notice, had been followed by the defendant bank, it is probable that this suit would never have been brought, as the complainant would have had opportunity of protecting himself by recourse over on the parties for whom he was accommodation maker, as will appear later on.

It is clearly proven that such a custom was not known to this complainant, who was a lumber man, living in a small town in the State of Kentucky, two or three hundred miles from Nashville.

From what has already been stated, as to the proof on this subject, it is clear that the defendant cannot justify its payment of the note in question upon the ground of custom.

It is well settled that, to be binding, a custom must be general, as to place, and not confined to any particular bank or banks; it must be certain and uniform, and there must be reasonable ground

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to suppose that the custom was known to both parties to the contract, as it is upon this supposition that the parties are presumed to have contracted with reference to it. *Dabney v. Campbell*, 9 Hum., 686; *Saint v. Smith*, 1 Cold., 52; *Adams v. Otterbach*, 15 How., 545; Morse on Banking, Sec. 9 (Ed. 1888).

Having failed, then, to show a right to pay the note upon the ground of a usage or custom, binding upon this complainant, we are confronted with the proposition that, independent of usage, the bank, at whose place of business a note is, upon its face, made payable, has the right to treat the note as a check, and pay same, and charge it up to the account of the maker, where such maker is a depositor of the bank.

The question is presented for the first time in this State, although it has received the attention of text writers, and been passed upon by the Courts of other States, where we find a conflict of opinion.

Under such circumstances it is our duty to determine the question for ourselves upon reason and principle, and with a due regard for considerations of public policy and convenience, provided that in doing so we do not place our State in antagonism to the current of authority in this country.

We recognize the fact that it is of prime importance that the several States in this Union should, as far as may be, without doing violence to well settled principles of State jurisprudence,

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endeavor to bring about and maintain as much certainty and uniformity of decision on questions of commercial law as can be accomplished.

In response to this idea we would, upon the question now before us, yield much of the strong conviction we entertain thereon in the endeavor to place ourselves in line with the current of authority, if a strong and steady current could be found, which would not threaten to engulf and destroy distinctions which have been long well settled in this State.

While we must concede that the weight of text-book authority is in support of defendant's contention, we are unable to discover that the weight of judicial decision is in the same direction. Moreover, we are constrained to believe that the contrary view is more in harmony with well settled adjudications in this State, upon principles presenting analogous questions, and that the current of adjudged cases is certainly as strong in the same direction.

Let us see, in the first place, what is the relation between depositor and banker. It is merely that of debtor and creditor, where the deposit is not a special one. The money deposited in the ordinary course of business is at once blended with the general funds of, and becomes the property of the bank; the depositor has only a debt against the bank, payable on demand, upon the presentation and surrender of the draft or order, addressed to and directing the bank, in unequiv-

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ocal terms, to pay the amount of such draft to the person therein named, or to bearer. This order is commonly known in commercial and banking parlance as a check.

Reduced to its last analysis, then, the question at issue here may be said to be: If a creditor makes a note payable to a third party, at his debtor's place of business, does it operate as an order on the debtor to pay the note in the absence of any instructions, and in the absence of any understanding or agreement growing out of the previous course of dealing between the parties?

In the absence of authority the question would seem to carry its own answer in the negative.

In *McGill v. Ott*, 10 Lea, 147, this Court has said:

"A man who receives the money, as agent of another, cannot simply, in that capacity, make an application of such money to the payment of his principal's debt without the assent, expressed or implied, of the principal. The fact that the debt is due to him cannot change the principle. He was bound to account for the money to his principal, it is true, but this simply made him his debtor to that amount. If sued for it, he might, under our law, set off his debt under a plea, and then hold the money subject to such an adjustment of their rights. But this goes on the idea that each is debtor to the other, and not that one debt has paid the other."

The fact that the note was payable *at* the bank could not change the principle aimed at in the decision just quoted, unless we are to read the words *payable at* the bank as synonymous with the words payable *by* or *through* the bank.

It will be admitted that there is nothing in the primary meaning nor general signification of the terms to warrant the use of the words in the sense in which they are to be understood if the contention of defendant is to prevail.

It is equally plain that there is nothing in the origin and purpose of the words "payable at the bank," as used in notes, to justify the meaning sought to be given them.

The language is no necessary part of the instrument. It is as valid when made payable generally as when made payable at any particular place. Its purpose, as generally understood, is to designate a place where the holder may find the maker, and ascertain whether the latter is ready, able, and willing to pay the same; if not, then, having made demand at the place designated, there remains nothing for the holder to do but give notice to indorsers that such demand has been made and refused, as required by the law merchant, as a condition precedent to recourse on such indorsers.

For a while in England it was held that the failure to present at the place named on the note discharged the maker, and the conflict of decision between the Court of King's Bench and the Court

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of Common Pleas, before the decision of the House of Lords in 1820, in *Rowe v. Young*, in accordance with the decision of the Common Pleas, reversing the judgment of the King's Bench, was finally settled in 1 and 2 Geo. IV. Ch., 78, which enacted that an acceptance "payable at the house of a banker or other place" should be deemed a general acceptance, unless the words "and not otherwise or elsewhere" were added. 1 Am. Lead. Cases, 456 (364). But the almost unbroken current of authority in this country is that, so far as the maker of a note or the acceptor of a bill is concerned, the designation of a place of payment does not make a conditional liability dependent on presentment and demand at such place, but is an absolute liability to pay generally. So that practically the insertion of the place of payment is without utility so far as the maker is concerned; and its principal, if not its sole, office, practically, in this country now, is to dispense with the inconvenience and uncertainty attending the presentment and demand upon the maker at the proper place to fix the conditional liability of indorsers. With the place of payment designated on the face of the note, no question can arise as to due diligence, etc., on the part of the holder in his efforts to make demand on the maker; he has only to present it at the place named, without regard to the residence or place of business of the maker, and, if dishonored, give notice to the indorsers, and the latter become liable.

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That such is the view taken by our Court of the purpose and effect of such a clause in a note, see *Bynum v. Apperson*, 9 Heis., 638, where it is said: "By making the note payable at the bank it was fairly contemplated by the parties that the payment should be made at the bank." And in *Lane v. Bank of West Tennessee, Ib.*, 436, it is said: "And if the note be payable at a particular bank, and before the day of payment arrives that bank has no place of business, and ceases to exist, and another does business in the same room, it is sufficient to present the note for payment at their room."

While the question now under consideration was not presented nor discussed in the two cases just cited, they serve to illustrate the argument that the use of said terms in no sense converts the note into a check.

If such a clause in a note converts it into a check, or, in the language of the text-books cited by defendant, is tantamount to an order to pay same out of the funds of the maker on deposit with the bank at which the note is made payable, it would seem to follow that the failure of the holder to present same, and the subsequent insolvency of the bank with funds of maker on hand sufficient to pay same, would discharge the latter, and cast the loss on the holder, whose negligence was the occasion of the loss; and such is the holding of some of the cases which constitute, in part, the authority upon which the text writers lay down



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the principle contended for here by the defendant bank. See *Lazier v. Horan*, 55 Iowa, 75 (S. C., 39 Am. Rep., 167), referred to by Mr. Daniel, in Note 3 to Sec. 326a of the 3d Edition of this valuable work, as justifying the text, in this language, "And other well-considered cases sustain this view." The "well considered cases" are *Lazier v. Horan*, *supra*, and *Thatcher v. Bank*, 5 Sand., 130; the *Aetna National Bank v. Fourth National Bank*, 46 N. Y., 88; and *Home National Bank v. Newton*, decided by the First District Appellate Court, Chicago, and reported in the *Banker's Magazine* for July, 1881, 8 Bradwell, 563, which we will presently examine.

The unsoundness of *Lazier v. Horan* is demonstrated in *Adams v. Hackensack Improvement Commission*, 15 Vroom, 638 (S. C., 43 Am. Rep., 406), where, after an able discussion of the authorities, it is said: "The naming of a bank in a promissory note as the place of payment does not make the banking association an agent for the collection of the note or the receipt of the money. No power, authority, or duty is thereby conferred upon the banker in reference to the note, and the debtor cannot make the banker the agent of the holder by simply depositing with him the funds to pay it with."

It shows that *Lazier v. Horan* was decided entirely on the authority of Sec. 229 of Story on Notes. No cases were cited in support of the proposition, and it overlooked the holdings to the

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contrary in the English cases of *Sebag v. Abitbol*, 4 M. & S., 462; *Turner v. Hayden*, 4 B. & C., 1.

It is also at variance with *Ward v. Smith*, 7 Wall., 447; *Williamsport Gas Company v. Pinkerton*, 95 Penn. St., 62.

The point decided in the cases last cited, while of course not conclusive of the question before us, is instructive by analogy, and establishes the unsoundness of the adjudications invoked to sustain the contrary view.

Equally unsound is the case of *Home National Bank v. Newton*, from the District Appellate Court of Chicago. At least it would so appear from the statement of what it holds, as found in the note to Daniel on Neg. Inst., just above referred to, which is all the information we have on the subject, as we have not had access to the case. The quotation made therefrom by Mr. Daniel (Vol. I., Sec. 326a, Note 3, p. 302) is as follows:

*First*—"As it is the duty of the bank to pay its customer's checks when in funds, so, at least, it has authority, if it is not under actual obligation, to pay his notes and acceptances made payable at the bank."

*Second*—"It is a presumption of law that if a customer does so make payable, or negotiable, at a bank any of his paper, it is his interest to have the same discharged from his deposit."

*Third*—"The neglect of the bank to make such appropriation would discharge the indorsers and sureties."

*Fourth*—The act of thus making his paper pay-

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able at a bank is considered as much his order to pay *as would be his check*, and if the bank pay without express orders to the contrary, it is a defence to a suit by the depositor for money so paid."

*Fifth*—"And the rule seems to be settled that if a bank *advances* the money to pay a bill or note of its customer, made payable at the bank, it may recover from the depositor *as for money loaned*, the paper so made payable being equivalent to a request to pay."

*Sixth*—"He makes the bank his agent, with implied authority to protect his credit by appropriating his deposits to the payment of his maturing obligations made payable at the bank."

The italics and the numbering of the paragraphs are ours, made for the purpose of emphasis and reference.

Now, are we willing to go this far? Must we establish as the law of this State the several propositions above announced, each akin, and logically dependent one upon the other?

Surely not, unless compelled by the overwhelming weight of authority. Does it not open a very Pandora's box of evils rife with litigation, and most hurtful in their character? Does it not alike astonish the professional and lay mind?

Does it not introduce, by arbitrary "presumptions of law," liabilities not "so nominated in the bond," and impose upon parties to commercial paper responsibilities not contemplated by them, and hitherto unknown? Does it not inject into the

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every day transactions of business men, where uniformity and certainty should be the corner-stones, elements of uncertainty and risk too grievous to be borne?

Is the liability of indorsers and sureties to depend upon the pleasure of the bank, whether or no it will appropriate the deposits of the maker to the payment of his notes, under the first and third propositions above.

If the bank should pay checks, drawn on the day of the maturity of a note of the maker, in favor of itself, or of a third party, to the exhaustion of the drawer's deposits, is it to be liable to the holder of the note for not having withheld sufficient funds to pay the latter? and is a twin suit to be born out of the same transaction between the holder and the sureties or indorsers, as to whether or not they have been thereby discharged, they, perhaps, having given notice to the bank, that unless deposits sufficient are held they will claim their discharge?

If the bank should, under such notice, deem it safer to withhold deposits sufficient for the note, is it to then encounter a suit with the holder of a check unpaid?

Is the maker of a note, where there has been a total failure of consideration, giving him a good defence to the note as against the payee or purchaser, not in due course of trade, to be held liable to the bank, which, in the absence of deposits, has gone forward and paid the note for the maker, ad-

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vancing the money therefor under the fifth proposition, authorizing the bank to treat the note, made payable months before at its house, as equivalent to a check or request to pay?

On the other hand, if the bank should fail to pay a note so made payable, where there were deposits sufficient, whereby the note is protested, is the bank to become a defendant to a suit for damages for injury to the credit and business of the maker, upon the authority of the sixth proposition, to the effect that the note so made constituted the bank the maker's agent to protect his credit out of the latter's deposits?

Illustrations of the inconvenience and hardships of the rule which we are urged to establish could be multiplied almost indefinitely, and are such as to readily suggest themselves to thoughtful men acquainted with the practical affairs of commercial life.

To hold a note payable at a particular bank as tantamount to a check on the bank is to confound distinctions heretofore established and well settled in the adjudications of this State between notes and checks.

A check is defined to be a written order on a bank directing it to pay a certain sum of money; a note is the written promise to pay another a certain sum of money at a certain time. One is payable on presentation, the other is payable on a certain day. One is entitled to days of grace, the other is not. One is an order on a third party,

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the other is the undertaking of the party himself. One is an *appropriation* of so much money in the banker's hands, the other is a *promise* to pay.

On the check, ordinarily, no right of action accrues until after presentment for payment; on the note a right of action against the maker exists without such presentment. 11 Hum., 88, *Blair v. Bank of Tennessee*; 2 Yer., 81, *Mulherrin v. Han-num*; 7 Bax., 301, *Springfield v. Green*; 7 Heisk., 190, *Planters Bank v. Merritt, Administrator*; 4 Yer., 216, *Brown v. Lusk*.

For these and other considerations, we cannot yield our assent to the doctrine urged by the defendant, and upon which the cause was decided in the Court below. We hold, therefore, that there is no implied authority for a bank to pay to a third party a note, made payable at its place of business, simply because of the fact that the maker has funds sufficient for that purpose, in the absence of any course of dealing or previous instruction to so apply the deposits.

Nor are we without express authority to sustain this conclusion.

The Supreme Court of Illinois, in the case of *Wood v. Merchants Savings Company*, 41 Ill., 267, has reached the same result in principle. The action was on a note payable at the banking house of Conrad. The holder presented the note, had it marked "good," but it was not paid. The bank failed, and the maker was sued on the note. The defense was that the maker had funds sufficient

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on deposit with the bank to pay the note; that it was the duty of the bank to have paid it when presented. The Court say:

“Had Conrad any authority whatever to pay the note out of the funds on deposit in his bank to the credit of the maker? The custom sought to be established among bankers has nothing, in our judgment, to do with the question. What is the effect of making a note payable at a particular place? Was it ever before heard that the effect was to transfer, *ipso facto*, the money at the place belonging to the maker absolutely to the holder, on his presenting the note at the place of payment? There is no such rule in any commercial country of which we have any knowledge. We do not understand that the fact of making a note payable at a particular place amounts to an agreement that the maker may make a deposit at the bank of the amount of the note, and thus discharge his obligation, and that the money so deposited is at the risk of the holder of the note. It is a mere designation of the place *where* the note is to be paid, not of the person to whom the money is to be paid. By the terms of the note the money was to be paid by the makers to the payee, not *to* (and it might have added *by*) Conrad, but *at* Conrad’s banking house. \* \*

\* \* If this be so, if the holders of this note were under no obligation to present this note at Conrad’s counter, does the fact that it was presented change the liability of the party in any

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way? \* \* \* Conrad had no right to pay it, nor could the money be taken to pay it, except by means of the verbal order, check, or draft of the maker and depositor."

The principle of that case is reaffirmed in *Bank v. Patton*, 109 Ill., 479.

In *Scott v. Shirk*, 60 Ind., 160, the Court say: "A bank of deposit has no power to apply a money deposit in its possession belonging to the maker of a promissory note, payable at such bank, to the satisfaction of such note, without his consent."

To the same effect is *Exchange Bank v. Bank of North America*, 132 Mass., 151, where the Court say: "The case expressly finds that Carnick, Calvert & Co. never had given any authority to the plaintiff to pay their notes out of their funds on deposit. Such authority cannot be implied merely from the fact that they made their notes payable there," citing in support of this proposition *Wood v. Merchants Savings Company*, 41 Ill., 267, above. This was as late as 1882, from a State of the highest authority on questions of commercial law.

The case of *Gordon v. Muchler*, 34 La. An., 604, is said to have settled for the State of Louisiana this question in the same manner. But we have been unable to examine this volume, it being misplaced from our State Library.

The Supreme Court of Missouri, as reported in the text-books, seems strongly to intimate a simi-



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lar holding. In *Bank v. Carsons*, 32 Mo., 191, the Court is quoted as saying: "The bank is not bound to apply the deposits, if it has even the authority to do so."

The text-books generally, which are cited as sustaining the defendant's contention, agree that it is not the duty (but merely a privilege that may or may not be exercised by the bank) of the bank to so apply deposits of the maker.

Surely this will not do to leave the action of the bank, upon which so many important, not to say intricate, rights of other parties depend, open to the uncertainty that must follow its optional exercise by the bank. We quite agree with Mr. Daniel in his work on Neg. Inst., Vol. I, Sec. 326b, that the question should be settled definitely, and not left to the option of the bank.

But we think it much sounder and safer to hold that, in the absence of instructions, either expressed or to be implied from previous course of dealings between the maker and the banker, the bank has no authority to apply the funds of its depositors to the payment to third parties of notes payable at its bank.

We limit this decision to a payment made to a third party, because we are not called upon to decide any but the case before us, which, as we have seen, is one of a payment to a third party.

The right of the bank to retain out of deposits sufficient to pay itself, where the bank is the holder and owner of the note, is quite a different

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question, involving an application of the law of set-off, and is not intended to be affected by any thing said in this opinion.

We close the citation of authority which is in accord with our conclusion, by a reference to 1 Edwards on Bills and Notes, star page 166, Sec. 195 (3d Ed., 1882), where the learned author says: "The better opinion undoubtedly is that the bank has no right to pay out the money of a depositor except upon his order, or with his assent," citing approvingly the 41 Ill. and the 60 Ind. cases above referred to.

See also Newmark on Bank Deposits (1888), Sec. 119, p. 120, where in the text it is said:

"A banker has no right to apply money on deposit in his bank to the payment of a note of the depositor, payable at the bank, without the order of the depositor," citing the case already referred to by us of *Ridgely National Bank v. Patton*, 109 Ill., 479.

If we consulted our own convenience and the necessities of the case, we would end this opinion here. But it has been so strenuously urged at the bar that the great weight of authority is the other way that it becomes proper, if not necessary, to refer to the authorities upon which such claim is predicated.

We have laboriously and at length examined every thing that has been available to us that presents the other side; but, owing to the length to which a review of cases ordinarily leads, we

will try to be brief in what we have to say in relation thereto.

It is true that Bolles on Banks and their Depositors, Sec. 403, and Morse in his work on Banks and Banking, Vol. II., Sec. 557, and Pratt in his Manual of Banking Law, Chap. 10, p. 44, after stating that there are authorities both ways, say the weight of authority is that it is the privilege of the bank (to be exercised or not as it may see proper) to apply deposits to the payment of a note of the depositor payable at its bank.

The American cases cited by these text writers are the same, and consist in the main of the following: *Manderville v. Union Bank*, 9 Cranch, 9; *Ætna National Bank v. Fourth National Bank*, 46 N. Y., 82; *Indig v. National City Bank*, 80 N. Y., 106; *Commercial National Bank v. Henninger*, 105 Penn. St., 496, and a few other cases where the bank was itself the holder of the note.

The States represented are not so numerous, as appears from their citations, as those who hold as we do, while the cases themselves will not stand close scrutiny.

Great prominence is given the case of *Manderville v. Union Bank of Georgetown*, from the Supreme Court of the United States, reported in 9 Cranch, 9. All the text-books quote the following language from the opinion in this case, pronounced by Chief Justice Marshall: "By making a note negotiable in bank the maker authorizes the bank to advance on his credit to the owner of the

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note the sum expressed on its face," and announce the doctrine as contended for. The few cases in the same direction build with equal confidence upon this decision. It must be admitted that when taken by itself the language quoted does seem to sustain them. But when we examine the facts in that case it becomes manifest at a glance that the point really decided, and to which the language was intended to apply, is as foreign to the question we are considering as it could well be, and does not relate at all to commercial paper.

The facts of the case were briefly these: Manderville, a citizen of Virginia, executed his note to one Nourse for \$410.50, sixty days after date, *negotiable* at the *Union Bank* of Georgetown, *payable* at the *Bank of Potomac*, in Alexandria. On the day of its execution the note was negotiated and discounted by the Union Bank of Georgetown, and the proceeds thereof paid over to Nourse. After this, Nourse, becoming indebted to Manderville, executed to him his note, due in sixty days, "*negotiable* at the Bank of Alexandria, *payable* at the Bank of Columbia."

When the note given by Manderville and discounted by the Union Bank fell due it was not paid, and the Union Bank sued Manderville thereon. He defended, trying to set off against the note the debt he held against Nourse. It was insisted for Manderville that his rights must be determined according to the laws of Virginia, the *lex loci contractus*, and that under the laws of that State a

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defendant is allowed to set off against the assignee of a promissory note any just claims which he had against the original payee before notice of the assignment of the note.

For the bank it was said that it was immaterial by which law the note was to be governed, for it was made with a view, expressed on its face, to be discounted by the Union Bank, whereby the defendant had waived any offset to which he might otherwise have been entitled. The Court in deciding the question said, and we give the opinion entire *in hac verba*:

“It is entirely immaterial whether this question be governed by the laws of Virginia or of Maryland. By neither of them can the discounts claimed by the plaintiff in error be allowed. By making a note *negotiable* in bank (the italics are ours) the maker authorizes the bank to advance on his credit to the owner of the note the sum expressed on its face.

“It would be a fraud on the bank to set up offsets against this note in consequence of any transactions between the parties. These offsets are waived, and cannot, after the note has been discounted, be again set up. The judgment is to be affirmed, with damages at the rate of six per cent. per annum.”

Thus we see that no possible question arose upon that part of the note making it *payable at* the Bank of Potomac, nor *with* that bank, but upon that part of the note making it *negotiable at*

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the Union Bank and with the latter bank, and no question of the *application* of bank *deposits* in any shape is presented. The only matter considered, or that could possibly have been considered by the Court, was whether a party having authorized a bank to discount his note could thereafter set off debts he held against the payee of the note. The facts of this case were not published in the earlier Cranch reports, which doubtless accounts for the misconception of the opinion by the usually accurate, and always learned, text writers, who have made it the ground work of the effort to establish the rule as contended for by defendants in the case at bar. The facts will be found in "The Lawyers' Co-operative Publishing Company's" Edition of the U. S. Supreme Court Reports.

The case of *Com. Nat. Bank v. Henninger*, 105 Penn. St., 496, is greatly relied on by the text-books above referred to. There the bank was the holder and owner of the note, and the maker was B. F. Young, its cashier. At the close of business on the day of the maturity of the note there were funds of the cashier on deposit sufficient to pay it.

The cashier, instead of charging up said note against his deposit, handed it to a Notary for protest, the object being to hold the indorser, and compel him to proceed against the maker in order to let in a defense which the maker could not set up against the bank. The suit was by the bank against the indorser, who claimed to be discharged

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by the facts stated. The Court, among other things, say:

“Where the depositor becomes indebted to the bank on one or more accounts, and such debts are due and payable, the bank has the right to apply any deposit he may have to their payment. This by virtue of the right of set-off. Where a general deposit is made by one already indebted to the bank the latter may appropriate such deposit to the payment of such indebtedness.”

And while admitting that the bank might waive this right of set-off, so far as it was concerned, yet where the rights of other parties were concerned the waiver may result in releasing sureties; the Court illustrating the ground of the decision in the following language:

“If I am the holder of A’s note, indorsed by C, and when the note matures I am indebted to A in an amount equal to or exceeding the note, can I have the note protested, and hold C as indorser? It is true A’s note is not technically paid, but the right to set-off exists, and surely C may show, in relief of his obligation as surety, that I am really the debtor instead of the creditor of A. If this be so between individuals, why is it not so between a bank and an individual?”

How far removed this case is from supporting the doctrine as contended for here is too manifest to justify elaboration, yet it is cited in the text-books as sustaining the assertion that the weight of authority is in favor of the right of a bank,

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without regard to whether it is or not the holder of the note, to appropriate deposits of maker to its payment upon the idea that a note made payable at the bank is tantamount to a check on the bank.

Let us see next what is in the case of *Indig v. National City Bank*, 80 N. Y., 100. Plaintiff held a note payable at the Bank of Lewville. He deposited it with the defendant bank for collection, who sent it by mail to the Bank of Lewville. On maturity the Bank of Lewville charged the note up to the maker, he having funds there on deposit, and forwarded its draft to defendant. The Bank of Lewville failed before the draft was cashed. The plaintiff sued the defendant for the amount of the note, which amount he alleged was lost through defendant's negligence. It was insisted for the plaintiff that defendant, by sending the note to the Bank of Lewville, constituted that bank its agent for the collection of it, and "therefore liable for the proceeds, as having been received by the Bank of Lewville, the last named bank being deemed to have received the proceeds by charging the amount of the note against its customer, the maker." The Court, in response, say:

"We do not think that any such agency was created. The note, *in so far as relates to its presentment at the bank*, and the duties of the bank in respect to it, was equivalent to a check drawn by the maker upon the bank where the note was



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made payable," citing *Ætna National Bank v. Fourth National Bank*, 46 N. Y., 88.

We will first observe that the portion of the opinion which we have taken the liberty of italicizing is directly in conflict with the decisions in our own State with reference to the duties of the holder of a note so payable as to the non-necessity of presentment, etc., and overlooks and confuses the distinctions we have already pointed out between a check and a note as to presentment.

The right of the Bank of Lewville to pay the note, because made payable at its place of business, was not the issue in that cause, but in the argument upon the non-liability of the defendant the Court merely assumed upon the authority of the *Ætna Bank* case in 46 N. Y. that such was not the law. So that, for the soundness of the doctrine, we must turn to the 46 N. Y. case. When we read the syllabus we are told that it simply decides that a direction of a bank depositor to his bank to pay out his funds on his notes due and to become due, in a certain order, creates no trust in favor of the holders of such notes, and that they have no right of action against the bank for its failure to comply with the depositor's instructions. The facts were that the Florence Mills, a Connecticut corporation, had made two notes, payable at the counter of the defendant; one fell due April 2d and the other April 4th. The note falling due on the 2d of April was presented for payment, and protested for non-payment. On the

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3d of April the Mills Company sent a letter to the bank containing a draft (which, with a small balance to the credit of the Mills, was sufficient to pay either note, both being for the same amount), with directions to credit their account with the draft, and then to pay their note falling due on the 4th. The draft was collected on the 3d, the day it was received, and on the same day the bank paid the note that had been protested on the 2d. The note due on the 4th not being paid, the holder sued the defendant, insisting that the letter directing how the proceeds of the draft should be applied operated as an equitable assignment or appropriation of the proceeds to the payment of its note falling due on the 4th.

This alone was the issue, and such was the Reporter's understanding of it, as shown by the syllabus. The opinion takes a much wider range, and does announce the doctrine as broadly as here contended for, that a note payable at a particular bank is, in substance, a check.

But that part of the opinion making the announcement is without any citation of authority or process of reasoning to sustain it, and it is difficult to understand exactly upon what the Court predicated its opinion that the note was the equivalent to a check. In two paragraphs it seems to be placed upon the agreement or understanding of the parties, and in another upon commercial usage, while in another it seems to be predicated upon the legal effect of the note so written.

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Nor does it appear that the defendant bank was not itself the owner of the past due note to which the deposit was applied, in violation of the instructions of the depositor.

Moreover, the opinion was by a divided Court, Chief Justice Church dissenting. So that our answer to this case, which is much relied on by the defense here, is that what is said concerning the question now before us was incidental merely, unsupported by reason or authority, and with an ambiguity of statement of facts, so far as this question is concerned. And we may be permitted to add that on the very point decided it is of most questionable soundness. It virtually holds that a customer of a bank cannot make a deposit, with instructions accompanying the same, to apply proceeds to a note of the depositor maturing on the succeeding day, that would prevent the bank from applying the proceeds to a note past due before the deposit was made. It seems not only to create a new law for banks, but it strikes down the well-established right of a debtor, unable to pay two debts, to direct and control the application of his payments to the one he may prefer.

The authority of such a decision, viewed from any stand-point, is not sufficient to overturn our convictions, nor break the force of the well considered cases holding to the contrary.

In *Pease v. Warren*, 29 Mich., 9, Judge Cooley says: "It cannot be pretended that the making a note payable at a particular bank can make the

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bank the agent of the *payee* to receive payment," and we ask, Would this not be just as fair and reasonable reading of the terms as it is to construe them to make the bank the agent of the *payor* to make payment? They would serve the one purpose as well as the other; and there is as much authority for the one holding as the other, and several of the cases cited as sustaining the defendant's contention here, do go to the very point of deciding what Judge Cooley says is not law. Such is the decision in *Lazier v. Horan*, 55 Iowa, 75, already herein referred to.

It is true that Mr. Daniel in the 3d Ed., Vol. I., Sec. 326a, of his valuable work on Neg. Inst., says that in his previous editions he had taken a different view, but that he is now of opinion that he was wrong, and that "upon principle and authority we should say that a banker at whose place of business negotiable paper is made payable, may apply to its payment funds of the maker on deposit, at its maturity, the relations of banker and customer and the terms of the instrument justifying the inference that the customer intended this to be done," citing in note the case of *Indig v. National City Bank*, 80 N. Y., 106; and adds in the text, "And other well considered cases sustain this view," referring to *Lazier v. Horan*, *Thatcher v. The Bank*, *Ætna Nat. Bank v. Fourth Nat. Bank*, and the case of *Home Nat. Bank v. Newton*, already so freely quoted from by us. While we entertain for this distinguished author the highest

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respect for his learning and accuracy [and the writer especially esteeming him no less highly personally than professionally], we are constrained to believe that the view expressed in the previous editions of his work is sounder and more in keeping with authority and reason, and the necessities of the large interests concerned, than is found in the last. There is no new light shed on this subject that, in our opinion, justifies the change of view.

This author seems to consider separately the rule as applied to acceptances and to notes, and as to acceptances he says: "It may be regarded as well settled law in England, that an acceptance payable at a particular banker's is tantamount to an order on the banker to pay same to the person who, according to the law merchant, is capable of giving a good discharge to the bill." In support of this he cites in note 3 to Sec. 326a, *Roberts v. Tucker*, 16 Ad. & El., N. S., 578; *Keymer v. Laurie*, 18 L. J., Q. B., 218; *Foster v. Clements*, 2 Camp., 17, and in addition thereto, Thompson, Chitty, Parsons, Byles, and Edwards on Bills.

Of the text-books cited, Edwards, as we have already seen, takes a different view, while the others refer to the same cases that Mr. Daniel does, as far as they were extant at the time of publication, their text adding nothing thereto germane to the point under discussion.

Having already extended this opinion beyond

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what is deemed necessary by the writer, we will undertake to go into but one of the English cases referred to, although they have all been considered. *Roberts v. Tucker*, 16 Ad. & El., 578, was where the banker paid an acceptance of the Pelican Life Insurance Company, payable at such banker's, upon a forged endorsement. This payment was debited to the Company on its pass-book, and returned to it by the banker, and the company credited its banker on its books.

Subsequently the company was compelled to pay the amount thereof to the true owner of the acceptance, and thereupon brought this suit against the banker.

The first count in plaintiff's declaration alleged that in consideration of certain money, loaned by it to the defendant banker, and of the agreement to retain and employ the defendant as the banker of plaintiff, the defendant undertook, and promised the company, to the extent of money so lent, to *pay to the lawful holders thereof all such bills of exchange as should be accepted by the company, payable at the banker's house, and that not regarding, etc., the defendant had charged plaintiff with an acceptance that had been paid to persons not legally authorized to receive payment and give an acquittance, etc.*

The second count was for money loaned, account stated, etc.

The contest was whether the course of dealing between the bank and its customer, creating the

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obligation of the banker to pay his customer's acceptances made payable at the place of business of the banker, rendered the latter liable if he paid same upon a forged endorsement, it being conceded that the act of acceptance was a guaranty of the genuineness of the drawer's signature.

The Court decided that the banker's authority to pay was limited to the payment of genuine endorsements. The Court adding that "if bankers wish to avoid the responsibility of deciding on the genuineness of endorsements, they may require their customers to (domicile) their bills at their own offices, and to honor them by giving a check upon the banker."

. And it was in this connection that Parke, B., used the language that has been made the basis of the announcement by the text writers of the doctrine contended for, the latter losing sight of, as we think, the custom and course of dealing, if not an express agreement, that by reason of the deposit or lending of the funds to the banker, the latter undertook to protect the credit of the customer, under which, if he failed to do so, the banker became liable to an action by his customer for permitting him to be dishonored. See *Marzette v. Williams*, 1 Bar. & Ad., 415; *Whitaker v. Bank of England*, 1 C. M. & R., 744.

Recognizing the mutuality of the obligation, it was said by Maule, J., in *Robarts v. Tucker*, *supra*, that "It is a hardship on a banker, if he must either pay the bill at once, at the peril of an en-

dorsement proving a forgery, or dishonor the bill, at the risk of an action against him by his customer."

*Foster v. Clements*, 2 Camp., cited by Mr. Daniel, and other text-writers, was a case presenting for adjudication the same question presented in *Roberts v. Tucker*, differing from it only in the fact that in *Foster v. Clements* the banker had paid the acceptance without funds, and then sued the acceptor, its customer. The acceptor defended upon the ground that the bank had not proven the genuineness of the first indorser's signature.

If we are to engraft upon the law of this State what is said to be the English rule, authorizing the bank to treat the paper made payable at its place of business as tantamount to a check, we should do so, not *in part*, as the few American cases relied on do, but as a whole, and carry with it an obligation and duty upon the bank to pay, so that upon a failure to do so it must be liable to an action for damages for injury to the credit of its customer. Well might the banks pray to be delivered from their friends if the rule contended for is to be established in this State with all its attendant uncertainties and dangerous liabilities.

Without referring further to the cases cited in the text-books, they may be classed as resting either on custom well established or course of dealing between the parties thereto, or to paper



owned and held by the bank at maturity, where the principle of set-off has been applied.

Without further discussion we hold on this branch of the case the decree of the Chancellor was erroneous, and should be reversed.

Of course it is needless to add that there is nothing to prevent any depositor from making such agreement with his bank as to the protection of his paper. We merely hold that in the absence of an understanding the bank pays at its peril.

One other question remains to be disposed of. For the defendant it is urged that if it be held that the bank had no authority to pay the note, then they ask to be permitted to rely upon such payment as a set-off against complainant's demand, and the note is filed with the answer, showing the indorsements as given in the opening statement of this opinion. The answer is asked to be taken as a cross-bill, but no process is issued.

Without determining whether this matter could or could not be made in answer merely, without cross-bill, it is sufficient to say that in whatever form presented it would be unavailing to the defendant under the proof in this case, which shows that by reason of such unauthorized payment, and the failure of the bank to notify the complainant thereof, the latter had a settlement with J. D. Carter & Co., the parties primarily liable, as between themselves and complainant, subsequent to

Grissom v. Bank.

such payment, and in ignorance thereof, wherein complainant allowed Carter & Co. credit for the amount of said note, upon the assumption that they had, in accordance with their contract, paid the same. In consequence of all of which, together with the subsequent insolvency and removal from the State of Carter & Co., before any knowledge that his deposits had been applied, the complainant has lost recourse over on parties primarily liable thereon. So that to allow the set-off would be to cast upon complainant the loss resulting from the unauthorized act of the defendant.

Under the facts of this case the complainant's equity is superior to any right of set-off which the defendant might otherwise have had.

Let the decree be reversed and judgment here for the complainant, with interest and costs.

Judge Lurton dissents from the foregoing.

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Ferriss v. Tavel.

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FERRISS v. TAVEL.

(Nashville. February 23, 1889.)

1. **BILLS AND NOTES.** *Given on parol sale of land, voidable when.*

Negotiable notes, given for land sold by parol contract, are voidable, at maker's option, before, but not after, they have been acquired by a *bona fide* holder, for value, in due course of trade.

2. **SAME.** *Indorsement. Notice. Recitals in Note.*

An indorsee of negotiable paper, protected in other respects against pre-existing defenses, is not put upon inquiry and thereby affected with constructive notice of the voidable character of notes given in consideration of parol purchase of lands, by the recital on their face that they were given for lands therein specifically described.

Cases cited and approved: 38 Ind., 15; 38 Iowa, 126; 34 Ind., 380; 22 Ohio St., 558; 109 Mass., 36; 8 Neb., 12; 26 Mich., 410, 254.

Cited and disapproved: 65 N. C., 178 (S. C., 6 Am. Rep., 739); 6 Ire. Eq., 526.

3. **SAME.** *Same. For pre-existing debt.<sup>4</sup>*

Indorsee, taking negotiable notes in payment of pre-existing debt, holds them subject to all defenses available against the prior holder, *e. g.*, the defense that they were given in consideration of parol purchase of lands.

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FROM DAVIDSON.

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Appeal from Chancery Court of Davidson County.  
ANDREW ALLISON, Ch.

VERTREES & VERTREES for Complainants.

EAST & FOGG and J. P. HELMS for Respondents.

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Ferriss v. Tavel.

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CALDWELL, J. On the fourth day of March, 1887, defendant Tavel, by parol contract, sold to complainants a block of town lots, supposed to contain eight acres, for the price of \$8,000, one-half in cash and the balance in six and twelve months. The deferred payments were evidenced by two notes for \$2,000 each. Tavel indorsed one of these notes to defendant Hickman and the other one to defendant White.

After this, and when it was ascertained that the ground in fact contained only about five or six acres, and that Tavel's vendor had a lien for purchase money on the land which he refused to release, the trade between Tavel and the complainants was rescinded. by mutual agreement, Tavel binding himself to return the cash and the notes received from the complainants. The cash was returned, but, as the notes had been indorsed, they were not returned.

This bill was brought to restrain the collection of the notes, and to have them surrendered and canceled.

Complainants allege that the contract between them and Tavel for the sale and purchase of the land was void because not reduced to writing; that the consideration for the notes has failed; and that the indorsees of the notes knew these facts and took the notes, not in due course of trade, but as collateral security for pre-existing debts.

Hickman and White answer separately, and in

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their respective answers insist that they are innocent holders of said notes for value, and that the same are valid and subsisting debts, in their hands, against the complainants.

Upon these pleadings and full proof the Chancellor heard the cause, and decreed:

*First*—That as between complainants and Tavel the notes were without consideration and void.

*Second*—That White was an innocent holder of negotiable paper for value, and in due course of trade, and that he was entitled to retain his note and recover upon it.

*Third*—That Hickman took the note held by him with notice and in payment of a pre-existing debt, and that the same should, therefore, be surrendered and canceled.

Complainants appealed from so much of the decree as refuses them relief against White, and Hickman appealed from that part of it directing the surrender and cancellation of his note.

The proof shows that White took the note from Tavel in payment of a debt created at the time, and without *actual* notice of any fact that would defeat the collection of the note. But it is argued that the recital in the face of the note that it was given for the "third payment on twenty-eight lots in Rains' Addition, Ninth District, this day purchased of Albert Tavel," was sufficient to put White upon inquiry, and charge him with notice that the sale of the lots was verbal, and, therefore, not binding upon either

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party, and that with such notice the indorsee of a purchase-money note cannot be allowed to collect it after a rescission of the sale.

There is no longer any question in this State that either party to a parol sale of land may, at his election, abandon the contract and avoid all its obligations. This is so well settled that a citation of the decisions so holding is entirely unnecessary.

We have no case in Tennessee, however, deciding that the statement, in the face of a negotiable note, that it was given for land will put an indorsee upon inquiry, and charge him with notice of the nature and infirmity of a voidable contract.

The precise question seems to have arisen and been decided against the holder of the note in North Carolina. In *Howard v. Kimball*, 65 N. C., 178 (S. C., 6 Am. R., 739), the Supreme Court of that State said:

"We think the fact of the notes not being in the usual form of promise to pay money 'for value received,' but expressing on the face that they were given for the purchase money of the Rocky Swamp tract of land, was sufficient to put Bullock on inquiry, and fix him with notice that the notes could not be collected unless a good title be made to Kimball," citing *Cox v. Jerman*, 6 Ire. Eq., 526.

These two cases seem to stand alone, with the great current of authority against them. Among the many cases announcing a different doctrine are the following: *Doherty v. Perry*, 38 Ind., 15; *Bank*

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Ferriss v. Tavel.

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v. *Barrett*, 38 Iowa, 126; *Hereth v. Bank*, 34 Ind., 380; *Sackett v. Kellar*, 22 Ohio St., 558; *Taylor v. Curry*, 109 Mass., 36; *Heard v. Bank*, 8 Neb., 12.

The foregoing are cases in which the consideration was recited in the face of the note. Upon the same or a kindred principle it has been decided that notice not so imparted, but otherwise obtained, that a note was given for a patent right, was not sufficient to put an indorsee upon inquiry so as to preclude his becoming a *bona fide* holder. *Borden v. Clark*, 26 Mich., 410; *Miller v. Finley*, *Ib.*, 254.

It has also been held, on the contrary, that independent knowledge of the consideration of a note, when taken by the indorsee, lets in against him any defense touching the consideration which could have been made against the original payee. *Thrall v Horton*, 44 Vt., 388.

So a plea of failure of consideration has been sustained in a case where, in addition to such notice of the consideration, the indorsee, at the time of taking the note, had knowledge that the consideration would likely fail. *Harris v. Nichols*, 26 Ga., 414.

Mr. Daniel says:

"The mere statement of the consideration in a bill or note does not put the holder upon inquiry whether or not it really passed, or has failed in any respect. It is rather assuring than otherwise, for it is evidence, if the note be genuine, that it was given for value, and the specification of what

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value can no more challenge the holder's investigation than the omission of such specification. In legal effect it does not qualify the paper in any manner." 1 Daniel, Neg. Inst., Sec. 797.

In accord is Wade on the Law of Notice (2d Ed.), Sec. 94a.

Following the weight of authority, and what is regarded as the better public policy, we hold that the statement of the consideration in the face of the note did not impair its negotiability, and should not be allowed to prejudice the right of White to enforce its collection. The statement is not altogether superfluous. It would fill the office of identifying the note as one given for the purchase money of land in a case where its identification as such became important. Such cases are frequently before the Courts.

Had the complainants desired to make the note payable *on condition* that their contract for the land should be completely executed, or had it been their purpose to charge third parties with notice of any equities existing against the payee of the note, they should have so stated in or on some part of the note itself. That would have carried full knowledge to White, and afforded complainants perfect protection.

That Hickman took the other note in payment of a pre-existing debt is a proposition so clearly established by his own evidence and that of Tavel that it does not admit of debate. Such being true, it is well settled, by a long line of decisions



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of this Court, that he holds the note subject to the same defenses and all the defenses that could be made available against Tavel, the original payee.

The very skillful arguments of counsel, made for the purpose of taking this case out of the operation of that rule, though plausible, are unsound and unavailing.

It being shown that there was a failure of consideration, and a voluntary rescission of a voidable contract under which the note was executed, there is no room for contending that Tavel could now compel the complainant to pay the note. It follows that Hickman, who received it for a pre-existing debt, and therefore stands upon no higher ground than Tavel, cannot collect it.

The decree is affirmed. Complainants will pay one-half the costs of this Court and Hickman the other half.

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Bank v. Shelton.

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BANK v. SHELTON.

(Nashville. February 28, 1889.)

1. HOMESTEAD. *Of husband after wife's death.*

Homestead acquired by and vested in husband during wife's life-time is not lost upon his being left wholly without family by reason of her death.

Code cited: § 2940 (M. & V.).

Case cited and approved: Webb v. Cowley, 5 Lea, 722.

2. SAME. *Same. Upon second marriage.*

Homestead vested in husband during first marriage will inure, upon his death, to the benefit of widow and child of a second marriage, as against his creditors securing levy thereon while he was a widower without family.

Constitution cited: Art. XI., § 11.

Code cited: § 2935 (M. & V.).

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FROM GILES.

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Appeal from Chancery Court of Giles County.

A. J. ABERNATHY, Ch.

Bill to recover lands.

Both parties claim under John P. C. Reed.

Complainants purchased the land at judicial sale.

Defendants, as widow and child of said Reed, claim it as their homestead.

The facts are undisputed. In 1877 the land in controversy was set apart to said Reed as his homestead by an officer having execution against him. Reed then had a wife, but no children. He occupied the land until his wife's death, in November, 1881.

He continued to occupy it as his homestead, without any family, until his second marriage, in May, 1882, to defendant Virginia L. Defendant Samuel B. Reed was the only issue of this marriage, and was born March 6, 1883.

J. P. C. Reed died in 1885. His widow, Virginia L., remarried, and her husband died.

From the date of her first marriage until the bill was filed in this case, in 1887, she occupied the land in dispute as her homestead.

In 1880 J. P. C. Reed fraudulently conveyed his remainder interest in his homestead.

In April, 1882—while he was a widower without family—complainants, being creditors of said Reed, filed bill to set aside this conveyance, and subject the property to their debts. Complainants secured levy of attachment upon the property.

In September, 1882, after Reed's second marriage, complainants obtained decree for sale of the lands attached, "subject to said Reed's homestead right." At this sale complainants purchased. Their bill, brought to recover the land upon these facts, was dismissed by the Chancellor.

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Bank v. Shelton.

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Complainants appealed.

JOHN T. ALLEN and N. & W. B. SMITHSON for complainants.

FLOURNOY RIVERS and WILKES & STEELE for respondents.

CALDWELL, J. There are two legal questions for decision in this cause. They are:

*First*—Will a homestead assigned under the statute (Code, M. & V., 2940) to a debtor, whose family at the time of the assignment consisted of himself and his first wife, vest in his second wife and their minor child upon his death?

*Second*—Will the *lery* of an attachment on his “reversion expectant, or remainder interest,” in such homestead at a time *between* the death of his first wife and his marriage to a second wife, and the *sale* of the land under the attachment subject to his homestead right therein *after* his second marriage, deprive the second wife and their minor child of the homestead, and pass the land in fee to the purchaser upon the death of the debtor?

We answer the first question in the affirmative and the second in the negative.

The right of homestead having been acquired by the husband, as the head of a family, was not

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divested or lost by the death of the first wife. *Webb v. Cowley*, 5 Lea, 722.

Then the debtor had a homestead in the land when the attachment was levied. So he had at the time of the sale; and, inasmuch as the homestead was not liable to sale under attachment, the sale made must have been, *in law* as it was *in fact*, subject to his right of homestead in the land.

This right he had at the time of his death, and when he died it inured to the benefit of his "*widow*" and *minor child* by the very terms of the Constitution, and of the Act of the Legislature passed in pursuance thereof. Const., Art. XI., Sec. 11; Code (M. & V.), Sec. 2935.

That the wife, who was enjoying the homestead with the debtor at the time of the allotment, is not the same one who now claims the homestead, is entirely immaterial. The former was the *wife*, but never the *widow*; the latter was likewise a *wife*, and, more than that, is also the *widow*.

Nor is the case changed by the fact that the debtor had no wife at all when the attachment was levied on the land; for, as has already been seen, he had not lost his right to homestead by the death of his first wife. He had that right in the land after her death the same as before, and it was not and could not be reached by attachment any more at the one time than at the other.

Up to the very moment of his death he had this right, unimpaired by any thing that had pre-

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viously occurred. The person who *was his wife* at that time *is now his "widow,"* and she and their minor child are most manifestly entitled to the homestead under the constitutional and statutory provisions just mentioned. The complainant owns the land, subject to<sup>o</sup> that right, by virtue of its purchase.

The decree dismissing the bill is affirmed, with costs.

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Railroad v. Martin.

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## LOUISVILLE AND NASHVILLE RAILROAD CO. v. MARTIN.

(Nashville. February 26, 1889.)

1. MASTER AND SERVANT. *Fellow servants. Engineer and brakeman.*

An engineer is *fellow servant*—not the *superior* of a brakeman on his train, where, being deprived of their conductor, both pursue, independently of each other, the duties prescribed by the rules of the railroad company in such emergency—the engineer *not, in fact, assuming any control over the brakeman*, though having the right to do so.

Cases cited and approved: Railroad v. Wheelless, 10 Lea, 741; Railroad v. Handman, 13 Lea, 423; Railroad v. Collins, 85 Tenn., 227; Railroad v. Lahr, 86 Tenn., 335; Fox v. Sanford, 4 Sneed, 36.

2. SAME. *Same. Same. Charge of Court.*

Charge of Court, in such case, that the fact that the brakeman was subject to engineer's control, if the latter choose to exercise it, was the same, in legal effect, as acting under orders of the engineer, is erroneous.

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FROM ROBERTSON.

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Appeal in error from Circuit Court of Robertson County. A. H. MUNFORD, J.

L. T. COBB for Railroad Company.

H. C. CRUNK and JAS. L. WATTS for Martin.

FOLKES, J. Defendant in error was a brakeman in the employ of the railroad, and while so en-

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gaged was injured to the extent of having his foot crushed by being thrown violently to the ground from the top of a car by the negligence of the engineer, who, as it is alleged in the declaration, was at the time of the injury in charge of the train, in consequence of the absence of the conductor, so that the defendant in error "was under the control and subject to the orders of the engineer."

There was verdict and judgment for defendant in error in the sum of four thousand five hundred dollars.

New trial being refused, the railroad company has brought the case here by an appeal in error.

Several errors are assigned, but under the view we have taken of the case it will be necessary to dispose of only one of them.

After the Court had given his charge to the jury, and had given several special requests of the defendant, the plaintiff asked this charge, which was by the Court given, viz.: "The Court instructs you that being subject to the orders of the engineer is the same in effect as acting under the orders of the engineer, as you have been instructed, but in either case it must be by the rules and orders of the defendant to be lawful."

This is manifestly erroneous. The Court had in its main charge laid down the general doctrine with reference to fellow servants, and to superior. The jury had been made to understand that if the injury was inflicted by a fellow servant the plain-



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tiff could not recover, because he is held to have entered into the service, and been compensated therefor, with reference to the risk assumed by him, of injury from the carelessness of those who occupy toward him the position of fellow servants.

They had also been told that, while the engineer was ordinarily a fellow servant with the brakeman, the former might, under the rules or orders of the common master, become the superior of the latter, with right and duty to control and direct him; and that when the engineer did so assume and exercise toward the brakeman the authority so conferred upon him he became for the time being the representative of the master, and the master would be liable to the brakeman for the negligence of the superior.

Now, to follow these general statements of the charge, with the special one given at the request of plaintiff, was to neutralize and destroy what had theretofore been said.

It virtually and substantially told the jury that if, at the time of the injury, the engineer was in the position where, under the lawful rules and orders of the company, he might have taken charge of the train and directed the movements of the brakeman, the company would be liable for the engineer's negligence, as much so and to the same extent as if he had in fact taken charge and given orders and been at the time engaged in the exercise of his superior authority.

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Railroad v. Martin.

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The error of which is made the more apparent when applied to the facts of this case.

The record shows that the train, being a freight, had, while *en route* between Evansville and Nashville, become uncoupled or broken in two.

On the front there were the engineer, the fireman, and the defendant in error, who was the front brakeman, leaving the other two brakemen and the conductor on the rear fragment of the disconnected train.

That, under the rules of the company, in such a contingency it was the duty of the front brakeman to hasten to the rear end of his fragment of the train for the purpose of ascertaining whether, in the act of separating, any timbers had been detached which were dragging on the track, and which might injure or derail the front section should it undertake to back, or hurt the rear section should its own impetus bring it in contact with such wreckage.

It was his duty also to look out for the rear section, and by signals direct and regulate the movements of the engineer, so that he might move forward more rapidly if in danger of being run into by the rear section, or stop and move back to recapture the detached portion of the train.

The same rules made it imperatively the duty of the engineer to observe and obey the signals of the brakeman so on the lookout. The engineer had no right to stop, retreat, increase or slacken his speed unless and except in response to the sig-

nals of the brakeman if the latter was at his post engaged in the discharge of his duties. These rules were known to both engineer and brakeman, and each was in the discharge of his respective duties when the injury to the brakeman was inflicted. The engineer had given no orders or instructions to the brakeman; had done and said nothing indicative of a purpose to assume the functions of the conductor, nor to take charge of the train in any manner.

The brakeman says himself that the engineer did not direct him to go to the position from which he was injured, nor direct nor assume to control his movements in any way; that he went back because it was his duty to go for the purposes already stated.

That while so engaged, and within about three feet of the rear end of the rear car on the front section of the broken train, the engineer, having shut off steam, which slackened the speed of the train, then "suddenly jerked the train forward and I was thrown off behind on the road-bed; I had given the engineer no signal to go forward."

It is true that the engineer denies that he gave any sudden jerk, and says that when he found the brakeman was no longer at his post he went back and picked him up, and, when asked how he happened to fall, the brakeman said that he had accidentally walked off; but this is the only difference between them, for, as to the action of the brakeman in going back, they agree that the engineer

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gave no orders and did nothing indicating a purpose to take charge of the train.

It was also in proof that when the conductor is cut off from his train by the parting of his train, or otherwise, the right to command devolves upon the engineer, and if he has no brakeman on his part of the train when such accident happens it is his duty to send his fireman to the rear of his train to discharge the duties of look-out, as already detailed as pertaining to the brakeman in such an emergency.

We have a case, therefore, where the brakeman is injured by the negligence of the engineer of the same train while each is in the discharge of his respective duties. A contingency has happened which, under the rules of the company, authorizes the engineer to take charge and direct the movements of the brakeman; but inasmuch as the brakeman is doing, under general orders of the company, what he is required to do, and what is the best thing to be done for the safety of the lives of the employes and the preservation of the property of the company, the engineer has no occasion to take charge, and does not take charge as conductor, nor give any directions, nor do any act which as conductor he might be allowed to do, but confines his conduct entirely to his duties and functions as engineer.

In such a case the negligence is the negligence of a fellow servant of the brakeman, and the company is not responsible.

This is clear upon well-considered adjudications of this Court, which have settled principles, that control the disposition of this cause. See *N., C. & St. L. R. R. Co. v. Wheelless*, 10 Lea, 741, where it is held that an engineer is a fellow servant of a brakeman on the same train. This was a case where the conductor had ordered certain cars to be coupled, and had then left the engineer and brakeman to execute the order. Judge McFarland, in his elaborate and learned discussion of the case, says, among other things: "In many movements the engineer and brakeman act in accordance with general regulations, and a general knowledge of their duties, and without any special orders."

Such is the case at bar. Again: "They were engaged in a common service, each performing his particular part. \* \* \* But the engineer did not assume any supervision of the work, or give any orders in regard to it, and the plaintiff cannot in any fair sense be said to have been acting in this particular matter under the orders, either express or implied, of the engineer."

So it is here. This distinction is recognized in *N., C. & St. L. R. R. v. Handman*, 13 Lea, 423; *E. T. & W. N. C. R. R. v. Collins*, 1 Pickle, 227; *L. & N. R. R. Co. v. Lahr*, 2 Pickle, 335; the latter case making the distinction between personal and official negligence, of one confessedly at the time the superior, so far as it affects the servant's right to hold the master liable.

While the case of *Fox v. Sandford*, 4 Sneed,

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36, clearly points out the line which encircles "a foreman," and makes of him a fellow servant so far as the master's liability is concerned, where in the *particular matter* in which he is engaged at the time of the injury he is acting as a fellow servant, and not in his capacity of foreman.

As is well said in the *Wheelless* case, this State has gone as far as it is deemed prudent or wise to go in recognizing exceptions in modifications to the doctrine of fellow servants; and we have no desire to extend them one step beyond the point already reached.

The Circuit Judge should have charged the jury that, engineer and brakeman being ordinarily fellow servants, the company would not be liable under the facts proven in this case, unless the engineer had availed himself of his right to take charge of the train, and had taken charge and assumed to direct and control the movements of the brakeman; and that if both were acting under orders or rules of the company at the time, the brakeman as such and the engineer as such, the negligence was the negligence of a fellow servant, for which the master would not be liable.

Reverse the judgment and remand the cause for a new trial.

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Street Railroad Company v. Morrow.

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## STREET RAILROAD COMPANY v. MORROW.

(Nashville. February 28, 1889.)

1. TAXATION. *Assessment. Corporate franchises.*

Franchises of corporation are taxable property, and should be assessed, not separately, but with its tangible property.

Case cited and approved: Railroad v. Bate, 12 Lea, 573.

2. SAME. *Same. Right of way belonging to street railroad.*

Right of way acquired by street railroad over streets of city is an easement in, and assessable for taxation as, realty.

Case cited and approved: 90 Ill., 573.

3. SAME. *Same. Method of assessing street railroad.*

The proper method is to assess a street railroad as a whole, including, as elements of value, its franchise, right of way, iron rails, ties, spikes, etc.; but an assessment of its right of way and franchise, as a separate item from its other property, is not invalid.

4. SAME. *Same. Of omitted property. Constitutional law.*

Statutes authorizing assessment, for taxation, of property omitted from the regular assessment are valid and constitutional.

Act construed: Acts 1887, Ch. 2, § 24.

Cases cited and approved: State v. Whitworth, 8 Lea, 594; Shelby County v. Railroad, 16 Lea, 401.

5. SAME. *Same. Upon under-valuation. Constitutional law.*

Likewise statutes authorizing re-assessment of property assessed originally upon inadequate valuation are valid and constitutional.

Cases cited and approved: Railroad v. State, 8 Heis., 790; State v. Bank, 16 Lea, 114.

6. SAME. *Same. Payment of tax does not defeat re-assessment.*

Re-assessment is not defeated by payment of tax as originally assessed.

7. SAME. *Of corporate property and shares of stock.*

A statute neither imposes double taxation nor violates the constitutional mandate that "all property shall be taxed according to value," which requires corporations to pay tax upon value of their property, and their stockholders also upon the value of their shares.

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Street Railroad Company v. Morrow.

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Constitution construed: Art. II., § 28.

Act construed: Acts 1887, Ch. 2, § 8.

Cases cited and approved: Union Bank v. State, 9 Yer., 490; McLaughlin v. Chadwell, 7 Heis., 389; Memphis v. Ensly, 6 Bax., 553; Gas Light Company v. Nashville, 8 Lea, 406; Street Railroad v. Nashville, MS. (1880); Farrington v. Tennessee, 95 U. S., 679.

Case cited and distinguished: Tennessee v. Whitworth, 117 U. S., 129.

8. SAME. *Same. Collection of tax on shares through the corporation.*

Statute is valid which requires the Corporation to retain and pay out of dividends due to its stockholders the tax assessed against them upon their shares. Such is the meaning of the Act of 1887, Ch. 2, §§ 8-12.

Act construed: Acts 1887, Ch. 2, §§ 8-12.

Cases cited and approved: Haight v. Railroad, 6 Wall., 15; Bank v. Commonwealth, 9 Wall., 363; 52 Penn. St., 140; 81 Ill., 556; 31 La., 826; 57 Md., 31; 57 Vt., 68; 43 Mo., 67; 59 Md., 197; 101 U. S., 156.

9. SAME. *Situs of shares. Non-residents.*

For purposes of taxation *situs* of shares of stock may be fixed by statute at place where corporation is located, even as against non-resident stockholders.

Act construed: Acts 1887, Ch. 2, § 8.

Cases cited and approved: Iron Company v. Young, 85 Tenn., 189; McLaughlin v. Chadwell, 7 Heis., 389; Bedford v. Nashville, 7 Heis., 409; Mayor v. Thomas, 5 Cold., 600; 1 Black., 286; 19 Wall., 390; 65 Ill., 44; 59 Md., 185; 57 Vt., 81; 35 N. Y., 423.

10. SAME. *Exemption.*

Burden is upon taxpayer to show that he is entitled to exemption of one thousand dollars out of assessment of omitted property or other merely ancillary assessment, there being a presumption that he received this exemption out of the original assessment.

11. SAME. *Bonds of corporation. Situs.*

Bonds of corporation are taxable property, and have their *situs*, for purposes of taxation, in the absence of any special provision affecting them, at place of bondholder's residence—not at place where corporation is situated.

This *situs* cannot be altered, by statute, as to *pre-existing bonds*, without violating obligation of contract.

12. SAME. *Same. Same. Non-resident bondholders.*

Non-resident bondholders are not taxable in this State upon bonds of our domestic corporations held and owned by them. Neither the bondholder nor this property is within the jurisdiction of the State.



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The Act of 1887, Ch. 2, § 8, so far as it undertakes to impose such tax upon previously issued bonds, is invalid.

Act construed: Acts 1887, Ch. 2, § 8.

Cases cited and approved: 15 Wall., 319; 52 Penn. St., 140; 7 Hum., 121; 12 Iowa, 539; 25 Cal., 603; 11 Wall., 430; 106 Ill., 25; 27 Gratt., 344.

13. SAME. *Same. Same. Resident bondholders.*

Bondholders, resident in the State, are taxable, for county or city purposes, upon bonds of our domestic corporations held and owned by them only at place of bondholder's residence, not at place where corporation is located, if that be different.

The Act of 1887, Ch. 2, § 8, so far as it provides otherwise, is void.

Act construed: Acts 1887, Ch. 2, § 8.

14. SAME. *Same. Collection of tax on bonds through corporation.*

The Act of 1887, Ch. 2, §§ 8-12, so far as it undertakes to convert corporations into agencies for collection of taxes laid upon their bondholders, is so faulty, defective, and onerous to corporations, that it is impracticable and void.

Act construed: Act of 1887, Ch. 2, §§ 8-12.

Case cited and approved: 102 U. S., 684.

15. SAME. *Notice of assessment of omitted property.*

Notice to corporation is sufficient, under Act of 1887, Ch. 2, § 24, for assessment of shares of stock to their holders as omitted property, but not as to like assessment of bonds against the bondholders.

Act construed: Acts 1887, Ch. 2, § 24.

16. SAME. *Same. To unknown owners of bonds.*

Assessment, as omitted property, of the entire amount of a corporation's bonds, in a single item, to "unknown owners," without notice to any holders of the bonds, or their agents or representatives, is void. The corporation is not, for this purpose, to be deemed, under the Act of 1887, Ch. 2, § 24, the "agent" or "representative" of its bondholders.

Act construed: Acts 1887, Ch. 2, § 24.

17. SAME. *Bonds not treated as shares of stock.*

Bonds issued by an organized and going corporation to its stockholders, upon a merely colorable consideration, as a "bond dividend," and assessed as bonds for taxation are to be treated, in determining validity of assessment, as bonds and not as stock shares.

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Case cited and distinguished: Iron and Steel Company *v.* Morrow, *ante*, p. 262.

18. SUPREME COURT. *Practice. Question not raised or decided below.*

Question not raised or decided in lower Court will not be considered by this Court, when the parties omitted it from their agreed statement of facts, which undertook to enumerate the questions they intended to submit for determination.

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FROM DAVIDSON.

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Appeal in error from Circuit Court of Davidson County. W. K. McALISTER, J.

VERTREES & VERTREES and HILL & GRANBERRY for complainants.

Attorney-General PICKLE, MATT W. ALLEN, MOSES R. PRIEST, J. B. DANIEL, and T. M. STEGER for respondent.

LURTON, J. The plaintiff in error is a corporation, organized in 1859, under a charter granted by the Legislature of this State. As such corporation it obtained from the city of Nashville a right to lay down, maintain, and operate a line of street railway upon certain streets of that city. Under this charter and right of way granted by the city it has for many years been running a line of street cars.

In 1887 it was assessed by the regular assess-

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ors for purposes of State and county taxation upon the following valuations: Real property, \$10,000; personal property, \$50,000. In 1888 it was assessed as follows: Mules, \$3,600; cars, \$2,500; real estate, \$9,000; stockholders, \$75,000.

By Section 24 of the Assessment Law of March 24, 1887, it is provided: "That if at any time after the assessments have been made, it should come to the knowledge of the Chairman or Judge of the County Court, or the Clerk of the County Court, the County Trustee, or Sheriff, that any person or corporation has not been assessed, or has been assessed upon an inadequate amount, that it shall be the duty of such officer, on motion of the Attorney-General, to cite said person, or corporation, their agent, or attorney, or representative, to appear before the Trustee for the purpose of being assessed according to law; and said Trustee is hereby authorized and empowered to make the proper assessment against such person, firm, or corporation; \* \* \* and to cause the same to be entered on the tax books for collection.'" Acts of 1887, page 34.

Under this authority the defendant, who is the County Trustee for Davidson County, upon the motion of the Attorney-General, and upon notice to the said corporation, re-assessed the corporate property for both 1887 and 1888, and at the same time and upon the same notice—treating the corporation as the agent for and representative of the shareholders and bondholders of said company—he

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assessed the shares of stock in said corporation to the individual shareholders by name, and the outstanding coupon bonds of the company to "unknown owners." By this re-assessment the valuation of the corporate property has been largely increased. The shares of stock and the bonds of the company, not having before been assessed, are assessed as omitted property.

The company denied the right of the County Trustee to increase the assessment for 1887, it having theretofore paid the tax assessed against it for that year. It denied the right of the Trustee to assess the shares of stock, or to assess its bonds in such manner as to compel the company to collect the tax thus assessed from its shareholders or bondholders, or to compel the company to pay such tax so assessed, or be liable for same. It likewise denied the liability of its bonds to assessment, and the legality of the assessment made. Both the shareholders and the company denied the right of the Trustee to assess both the company's property and the shares of capital stock, as being double taxation.

These, upon an agreed case, were made up to have the validity of the several assessments determined, and to have the Act of 1887 construed and its constitutionality considered, and the liability of the company, by reason of said assessments under the provisions of the Act, declared and ascertained. The parties to this agreed case are the company and its shareholders upon the one side, and the

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County Trustee upon the other. The bondholders are unknown, and of course are not parties to this suit.

The agreed case was submitted to the Circuit Court of Davidson County, and all of the assessments were sustained as valid, except in so far as the franchises of the corporation had been, in the opinion of the learned Circuit Judge, assessed separately and independently of other property of the company. The action of the learned Circuit Judge is supported by an exceedingly able and exhaustive opinion, which, having been made a part of the record, has been of great service in reaching the conclusions we shall presently announce. That part of the assessment quashed by the Circuit Court will be first disposed of. The Assessor has undertaken to itemize the several properties of the company and to value them separately. The franchises of the company, *together with its easement in the streets of Nashville*, under the ordinances of said city and the contract between the city and the Street Railway Company, are assessed as of a valuation of \$50,000. This assessment was quashed under the authority of the case of the *Railroad v. Bate*, 12 Lea, 573, as being a separate and independent assessment upon a mere franchise. We think this a misconception of the property included in the item valued at \$50,000. The right of way in the streets of Nashville is an easement in realty and is assessable as realty. This is well settled. Desty on Taxation, Vol. I., 300, 405, 361, and 379.

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In the case of the *Chicago City Railway Company v. the City of Chicago*, this question as to whether the easement of street railway Company in the streets of a city was assessable as property was determined in the affirmative. Concerning such an interest the Court said:

"It is true, as urged by counsel, that the railway company has not become the owner of any portion of the street in fee, but it has certainly, through its charter \* \* \* and its contracts with the city, acquired a property in them of a most valuable character, which neither the Legislature nor the City can take away without the consent of the company, and capable like other property, of being sold and conveyed. The City has made a contract with the company by which it has granted to the latter what is substantially a lease-hold in a portion of its street for a number of years. It has acquired rights in the street which no other person or company nor the general public possess." 90 Ill., 573.

This easement in the streets, together with the franchises, are assessed as of a valuation of \$50,000. It would have been better to have assessed these elements of value with the iron rails, ties, spikes, etc., as together constituting so much street railway. In the case of *Railroad v. Bate, supra*, we hold that an assessment upon a line of railway as a continuous line, without a separate and independent assessment upon its franchise as a corporation, was not error. This was sound law, and we ad-

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here to it. But we do not think that case governs this. The franchise, to be a corporation, is property, and as such must be assessed; it ought, however, to be assessed with the tangible property of the company, and not separately. Here it has been assessed along with a valuable easement, an interest in realty, and we see no reason for quashing such an assessment as void.

The assessment of property, omitted from the assessment made by the regular Assessor, is expressly authorized by the Act of 1887. We have repeatedly sustained the validity of such assessments and the constitutionality of the Acts authorizing them. *State v. Whitworth*, 8 Lea, 594; *Shelby County v. Railroad*, 16 Lea, 401.

That part of the Act which authorizes an additional assessment when the original assessment has been upon an inadequate valuation, is not new legislation. The same provision was contained in the Act of 1873, and a re-assessment made of the property of the Louisville & Nashville Railroad Company was sustained by this Court as being authorized by that Act. *Louisville & Nashville Railroad v. State*, 8 Heis., 790. See also the case of *State v. Nashville Savings Bank*, 16 Lea, 114.

We do not see any constitutional objections to such legislation. The objection that the actual payment of the tax as originally assessed should preclude any further or additional assessment, does not go to the constitutionality of the Act. The objection is not of serious import in any view of

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it. The reply of the Circuit Judge is complete in every aspect of the question. He said:

"The Constitution and laws prescribed that all property should be assessed according to its value, and if by the misfeasance, non-feasance, or mistake of the Assessor, it is not assessed according to its value, but upon an arbitrary basis fixed by the Assessor at far less than its value, why should the tax debtor escape simply because he has made payment? \* \* \* It may be that such a law will work inconvenience and annoyance to the citizens, but all tax laws are odious and vexatious. It is said the citizen ought to know when he is through with the tax gatherer, but he will know when he has paid his taxes on his property according to its value. He will know then he is secure against re-assessment and the law will protect him."

The next objection to be considered is, that the assessment of the corporate property and of the shares of stock is double taxation, and prohibited by that clause of the State Constitution which requires that "all property shall be taxed according to its value." Conceding that the effect of this provision is to prohibit double taxation, the first inquiry is as to what is double taxation. It is not every *indirect* duplication of a tax which constitutes double taxation. If the duplication be only an incidence of the tax it is not double taxation in the sense of the requirement that equality and uniformity shall be preserved. Taxes may be divided into two great classes, direct and indirect. A direct tax, as defined



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by Mr. Mill, is "one demanded from the very person who it is intended or desired should pay it." A tax assessed as a direct tax, in the sense in which Mr. Mill uses the term, may nevertheless fall ultimately upon one other than the one desired to pay it. To illustrate, political economists are generally agreed that the greater part of a tax assessed against a landlord falls finally upon his tenant. So a tax upon mortgages upon land in the end proves to be a tax upon the borrower. In neither of these cases was it intended or desired that the burden of the tax should fall upon either the renter or borrower. Yet, although it may happen that the renter and the borrower have in other forms fully paid their due proportion of taxation, the unintended duplication of their burden will not make the tax which they have indirectly been compelled to pay double taxation. So there seems to be double taxation of the same property to two individuals where the purchaser of property on credit is taxed to its full value, while the seller is taxed to the same amount on the debt. Concerning all these incidences of taxation, Judge Cooley says: "Now whether there is injustice in the taxation in every instance in which it can be shown that an individual who has been directly taxed his due proportion is also compelled indirectly to contribute, is a question we have no occasion to consider. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of such

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unequal results." \* \* \* "There is a sense," he says further on, "however, in which duplicate taxation may be understood—and which we think is the proper sense—which would render it wholly inadmissible under any Constitution requiring equality and uniformity in taxation. By duplicate taxation in this sense is understood the requirement that one person, or any one subject of taxation, shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once." Cooley, Tax, 2d Ed., 220 and 225.

In this connection, and as illustrating what he deems double taxation, he cites the instance of a tax on a merchant's stock by value, and another tax for the same purpose and by the same authority, on the same stock as a part of his whole property. So he says, "the same may be said of a tax on the property of a corporation and also on the capital which is invested in the property; if the latter is taxed as property, this also is a duplicate taxation, and as much unequal as would be the taxation of a farmer's stock by value, when on the same basis it is taxed as a part of his general property. Where, for instance, the money paid in as capital of a manufacturing corporation has been invested in buildings and machinery, these are what then represent the capital, and to tax the capital as valuable property, distinct from that which represents it, would be to tax a mere shadow; and it would make the shadow stand for the substance in order that it might be

taxed, when the substance itself is taxed directly under its own proper designation." *Supra*, 226. It is clear, upon careful consideration, that in the paragraph just quoted, the eminent author is not speaking of a tax upon the shares in the hands of stockholders, but of the capital as property of the corporation and taxed to it as such. This is evident not only from the illustration he uses and which we have quoted, but in his chapter upon equality and uniformity of taxation, he says that "a tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself, or its stock, and may be laid irrespective of any taxation of the corporation when no contract relations forbid." *Supra*, 231. For this proposition he cites a great number of cases. If the whole of the capital stock had been converted into property and a tax was laid upon the latter, it would be difficult to see what valuation could be put upon capital, considered apart from the property into which the capital had gone, and apart from the shares in the hands of stockholders. Capital stock, when so considered, would not have any thinkable substance or shape, and as such could hardly be valued for taxation without treating the property into which it had been converted as the element which gave it taxable value, and this would be to duplicate the latter as a taxable value. It was to the capital stock in the hands of the corporation that Judge Cooper referred, when, in the case of *McGowan v. Bank*, he said that, "as a

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general rule the taxation of the capital stock of a corporation may protect its property in which the capital may be invested, and the taxation of the property may protect the capital stock, for the capital is usually the representative of the property of the corporation and the property the representative of the stock." 6 Lea, 705. Neither would be, under all circumstances, the representative of the whole of the other. All of the capital might not be converted into property, then something of value might remain for taxation as capital stock. So the property of a corporation might greatly exceed in value the whole of the capital, then a tax laid upon the latter might still leave an excess of property which might be taxed without imposing a double tax upon the capital stock. The tax in the case now being considered is laid upon the property of the corporation, and the capital stock in the hands of the corporation is, by express direction of the law-maker, omitted from assessment. The shares of stock in the hands of the stockholders and as the individual property of the shareholders are taxed. Now, are these shares exempted by reason of the taxation laid upon the property of the company? It may be true that the tax upon the property of the corporation may ultimately fall upon the shareholders, but this is only so by indirection, and such a result is only an incidence of a tax laid upon this peculiar and anomalous species of property. It is no more double taxation than the instances already put of the final result of a tax upon rented

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property or mortgaged land, or that upon property sold upon a credit where the debt is also taxed in the hands of the seller. That a tax upon the shares laid upon the owner, and a tax upon the corporate property, is not double taxation, has been settled law in this State for half a century. The opinions of our predecessors upon this subject are numerous, and the constitutionality of such taxation has been vindicated by reasonings so forcible and exhaustive that we cannot hope to add to their strength. *Union Bank v. State*, 9 Yerg., 490; *McLaughlin v. Chadwell*, 7 Heis., 389; *City of Memphis v. Easley* 6 Baxt., 553; *Gaslight Company v. Nashville*, 8 Lea, 406; *South Nashville Street R. R. Co. v. Nashville*, MS., Nashville, 1880. We have already seen the view taken by Judge Cooley upon this question, which he supports by opinions from a large majority of the States of this Union. The Supreme Court of the United States, in a number of opinions, has taken precisely the same view of this question. In the case of *Farrington v. Tennessee*, a case which went up from this State, Mr. Justice Swayne so clearly defines the distinction between the capital stock and the property in shares in the hands of stockholders, that we cannot refrain from quoting a paragraph from his opinion: "The capital stock," says the Judge, "and the shares of the capital stock, are distinct things: The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank and the means of conducting its operations. It

represents whatever it may be invested in. If a large surplus be accumulated and laid by, that does not become a part of it. The amount authorized cannot be increased without proper legal authority. If there be losses which impair it, there can be no formal reduction without the like sanction. No power to increase or diminish it belongs inherently to the corporation. It is a trust fund held by the corporation as a trustee. It is subject to taxation like other property. If the bank fail, equity may lay hold of it, administer it, pay the debts, and give the residuum, if there be any, to the stockholders. If the corporation be dissolved by judgment of law, equity may interfere and perform the same functions." "The shares of the capital stock are usually represented by certificates. Every holder is a *cestui que trust* to the extent of his ownership. They are held and may be bought and sold and taxed like other property. Each share represents an aliquot part of the capital stock. But the holder cannot touch a dollar of the principal. He is entitled only to share in the dividends and profits. Upon the dissolution of the institution each shareholder is entitled to a proportionate share of the residuum after satisfying all liabilities. The claims of all creditors are prior to his. The corporation, though holding and owning the capital stock, cannot vote upon it. It is the right and duty of the shareholders to vote. They, in this way, give continuity to the life of the corporation, and may thus control and manage its operations.

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The capital stock and the shares may both be taxed, and it is not double taxation. The bank may be required to pay the tax out of its corporate funds, or be authorized to deduct the amount paid for each stockholder out of his dividends." 95 U. S., 679.

The later case of *Tennessee v. Whitworth*, 117 U. S., 129, has been cited as in conflict with the *Farington* case. There is no conflict between the cases as we understand them. The *Whitworth* case involved a claim of exemption from taxation by the shareholders, by virtue of the charter of the N. & C. R. R., which provided that the capital stock of the company should be forever exempt from taxation, and that the property of the company should be exempt for the period of twenty years, and no longer. The court held that the exemption of capital stock meant an exemption of the shares in the hands of the shareholders, this view being reached upon a construction of the words of the charter. Two distinct things were held to be exempted: the property of the corporation for twenty years and the capital stock forever. That the something was not meant by "capital stock" which had been exempted by other express words and for a shorter term. The distinction between capital stock in the hands of the corporation, and shares of stock in the hands of stockholders, was distinctly recognized, Chief Justice Waite saying: "It is no doubt true that the Legislature may make a difference, for the purpose of taxation, be-

tween capital stock in the hands of the corporation itself, and the shares of the same stock in the hands of the individual shareholders."

Counsel for plaintiff have urged that under Section 9 of the Assessment Act the president or manager of the associations or corporations referred to in said section is expressly required to pay the tax assessed against the shares of stock out of the corporate funds, and that therefore the tax is one assessed against the corporation, and hence double taxation. If the corporation were required to pay such tax, whether it had dividends due to the tax debtors or not, there might be something in this objection. Section 9 is taken from the Act of 1873. In the latter Act it was manifestly limited to private banking associations. The original section has added to it words which seemingly make parts of it apply to all corporations. Just what is meant by this section it is unnecessary to say, further than that it has no application, in our opinion, to domestic corporations. The liability cast upon such corporations by assessments upon stocks or bonds is defined by the other sections of the Act. By the eighth section it is provided that no tax shall be assessed upon the capital stock of corporations, but that they shall be taxed upon their property. It is also provided that the shares of stock and the bonds issued by such corporations shall be taxed "in the valuation of the personal property of such bondholders and stockholders in the assessment of State, county, and city taxes," at the



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place where such corporation is located, whether such owner reside at such place or not. Section 10 requires each corporation to keep, subject to inspection, a correct list of such shareholders and bondholders, with their residences, and the amount of stock and bonds owned by each. By section 11 a lien is declared to exist upon the shares of stock and bonds assessed under this Act, and the collector authorized to institute attachment proceedings to collect the tax in certain cases. By the twelfth section it is provided "that it shall be the duty of the president or managing officer of every such bank or other corporation doing business in the State to retain so much of any dividend or interest belonging to such stockholder or bondholder as may be necessary to pay any and all taxes assessed in pursuance of this Act, until it shall be made to appear to such officers that said taxes have been paid." From these provisions it is most obvious that the tax is not to be assessed against the corporation but against the shareholders and bondholders individually. The last section cited impounds in the hands of the corporation any dividends or interest, or so much thereof as may be necessary, which may be due or which may thereafter become due, to such shareholder or bondholder, and by implication authorizes the corporation to pay out of the fund, so due to the tax debtor, the taxes assessed upon the stock or bonds held by such tax debtor in the corporation. The company is thereby made an agency of the taxing

power for the collection of the tax due from its shareholders or bondholders. It is under no obligation to pay the tax out of its own funds, being only required to reserve from dividends or interest a sufficiency to pay the particular tax. Clearly, if the corporation should, after such assessment, pay out to its shareholders any dividend without reserving for the payment of the tax, it would voluntarily make itself liable for the payment of the tax. This is the full limit and measure of the responsibility imposed upon such corporations by this Act. If the corporation is a non-dividend paying concern, and this condition is real and not colorable, this scheme, for the better collection of such a tax, will be wholly inoperative. Is this plan for the collection of the tax upon shares of stock liable to taxation subject to any constitutional objections? We see none. It is nothing more than a garnishment prevailing against the corporation to better secure the payment of the tax out of dividends due or to become due. No injustice is done the company. The plan looks to a cheap, speedy, and sure means of collecting a tax otherwise exceedingly difficult to either assess or collect. The shares are the things taxed. It matters not who may own them the dividends attach to and belong to the owner of the shares at the time they are declared, and out of these dividends the sum necessary to pay the tax must be reserved. Such methods of collection are not at all unusual or unique. "For the most part," says Judge Coo-

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ley in his work on Taxation, "the taxes levied by the States are collected of the persons taxed or enforced against the property in respect to which they are imposed. In a few cases, however, in which no injustice could result from such a course, the State may reach the party by indirection and collect in the first instance from some one else, who in turn will become collector from the person on whom the tax is really imposed. The reason is that in such cases it is more convenient to the State, and perhaps makes more certain the collection; and it could be resorted to only when the case is such that injustice could result to no one. A case of this kind is where the tax is imposed on the dividends or other receipts of shareholders from the profits of corporations, or upon their shares, and the corporation is required to make the payment, which it would then deduct from the payments to be made to shareholders." *Cooley, Tax*, 2d Ed., 432. Indeed, much more rigorous and onerous statutes of this kind have been sustained in other States. The Federal Government collected an income tax from shareholders and bondholders in corporations by requiring its payment by the corporation in the first instance, and permitting the company subsequently to deduct same from dividends or interest afterward due. The Act was held valid. *Haight v. R. R.*, 6 Wall., 15. The State of Kentucky had a statute which required corporations to pay the tax assessed against the shareholders of banks, and in turn collect same from

the dividend next due such tax debtor. This Act was held valid by the Supreme Court of the United States, Mr. Justice Miller saying that "the mode under consideration is the one which Congress itself adopted in collecting its tax on dividends and on the income arising from bonds of corporations. It is the only mode which certainly, and without loss, secures the payment of the tax on all the shares, resident and non-resident, and it is the mode which experience has justified in the New England States as the most convenient and proper in regard to the numerous and wealthy corporations of those States." *National Bank v. Commonwealth*, 9 Wal., 363. An Ohio statute, very similar in its provisions to our own, was held valid and obligatory upon the corporations affected. *Cummings v. Bank*, 101 U. S., 156. Many other States have similar statutes, and constitutional objections have not been sustained as to the collection of the tax on shares. *Maltby v. Reading R. R.*, 52 Penn. St., 140; *Ottawa v. McCaleb*, 81 Ill., 556; *New Orleans v. Savings Bank*, 31 La., 826; *Baltimore v. City Passenger Co.*, 57 Md., 31; *St. Albans v. Car Co.*, 57 Vt., 68; *Lionberger v. Rouse*, 43 Mo., 67; *American Coal Co. v. Alleghany County*, 59 Md., 197.

The next question to be considered is as to the taxability in this State of shares of non-residents, it appearing that certain of the stockholders of this company reside in other States. Since the Act of 1869, the *situs* of stocks in domestic corporations has, for purposes of taxation, been fixed at

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the place where the corporation was located. Shares of stock are an anomalous kind of personal property. The corporation itself being an artificial creation of the law, dwells only in law, in the State of its creation. *O. & M. R. R. v. Wheeler*, 1 Black., 286; *South Tredeger Iron Co. v. Young*, 1 Pick., 189. Its shares are only transferable on the books of the corporation. *Supra*. They only represent the interest the owner has in the dividends of a business carried on here by the officers of the company as the agents of the corporation, and protected by the laws of this State. In the event the corporation shall wind up, the shares represent the interest the stockholders may take in assets remaining after payment of debts. While the company is a going concern, its affairs are controlled and its management directed by vote of the shareholders. Shares are not debts of the corporation, as are its bonds or other obligations. The fiction that personal property has no *situs* but that of the owner will always yield whenever the actual fact is opposed to the fiction, and when the purposes of justice likewise demand that the actual *situs* shall be examined. Shares are a species of intangible personal property. They have no actual *situs* such as tangible personals may have. The *situs* of such an anomalous kind of intangible property may very well be fixed, for the purposes of taxation, at the place where the corporation has its *situs*. Such a *situs* is more nearly in accord with the fact than any other, and the location is in accord with reason

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and the demands of justice. The validity of legislation, thus fixing the place of taxation, has been more than once vindicated by this court. *McLaughlin v. Chadwell*, 7 Heis., 389; *Major v. Thomas*, 5 Cold., 600; *Bedford v. Nashville*, 7 Heis., 409. Precisely similar legislation has been sustained by the Supreme Court of the United States and by the Supreme Courts of nearly every State in the Union. The constitutionality of such statutes is no longer open to controversy. *Tappan v. Merchants Bank*, 19 Wal., 390; *Mundater v. Smith*, 65 Ill., 44; *American Coal Co. v. Alleghany*, 59 Md., 185; *St. Albans v. Car Co.*, 57 Vt., 81; *People v. Tax Comm.*, 35 N. Y., 423. A question has been made upon the argument that each shareholder so assessed is entitled to an exemption of one thousand dollars, as provided by Article 2, Section 28, which exempts one thousand dollars' worth of personal property from taxation in the hands of each tax payer. This is an agreed case. No such question was submitted or ruled upon by the Circuit Court, and in this situation, no demand for exemption being made in the court below, we think the question is not raised on this record. But upon another ground the contention cannot be here sustained, and that is, that it does not appear that such of the shareholders as are entitled have not, in fact, been allowed this exemption by the regular assessor. He is presumed to have done his duty, and it devolves upon the tax payer, when he is assessed upon omitted property, or when the assessment is ancil-

lary to the principal assessment of the tax debtor, to show that he has not, at some other time or place, received such exemption.

The agreed case shows that in 1884 this company issued bonds to the amount of \$132,000, secured by a mortgage on all of its property. These bonds were divided among its then shareholders. The only consideration seems to have been that the stockholders had, for several years, suffered all the profits to be expended in extending and improving the corporate property. Having thus voluntarily submitted to a deprivation of dividends, they regarded themselves as entitled to a "*bond dividend*." The contention of the State and County, that because these bonds were issued without consideration, that, therefore, they are to be treated and taxed as an additional issue of stock, is unsound for many reasons. It might be enough to say that they have not been assessed as stock, but as bonds held by *unknown owners*. This is not like the case of the *Iron and Steel Co. v. Morrow*, decided at this term. This was an organized and going corporation, its capital stock all being paid up. The validity of such bonds, as they may affect creditors, is a question not before us on this record. It is enough, however, that the validity of the assessment, *as made*, is the only question which we can consider. These bonds were assessed as bonds to the amount \$132,000 in the hands of "unknown owners." We are not to be understood as assenting to the validity of an assessment of a large

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lot of bonds owned by many different owners as a block of \$132,000 to "unknown owners." We waive the consideration of this question.

By Sections 8, 10, 11, and 12 of the Assessment Act under consideration, bonds issued by corporations are placed for purposes of taxation upon precisely the same footing as shares of stock. The tax *situs* of the bonds of such companies is fixed for purposes of State, county, and city taxation, at the place, county, or city where the corporation is located, regardless of the actual residences of the owners of such bonds. The corporation is made the agency of the State, county, and city, for the collection of the taxes assessed by the several governments, being required to reserve, from the interest due on the bonds, a sufficient fund to pay the tax assessed against each bondholder. The assessed bondholders, being unknown, are, of course, not parties to this proceeding. But inasmuch as a duty and a liability is imposed by the law upon the corporation owing these bonds, it very rightly insists that the law be construed, and its duty defined under the law, with reference to the tax thus assessed upon its bondholders.

That the officers of this company should not know who are now the owners of these bonds is not remarkable. The bonds bear coupons, and are negotiable, and have thirty years to run. Such bonds, when sold, require no transfer on the books of the company. The coupons mature every six months, and are payable at the American National Bank, and, as the agreed case shows, are paid by



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the bank upon presentation out of funds of the company placed there for that purpose. Some of the bonds were originally owned by residents of other States, and from the fact that coupons from such bonds are sent to the bank for payment from other States, it may be presumed that some of the bonds are now owned by non-residents. Are bonds owned by non-residents subject to taxation in this State? In a case involving the power of a State to tax bonds owned by non-residents, Mr. Justice Field, in delivering the opinion of the court, said: "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them the taxation may be exercised in a great variety of ways." \* \* \* "It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation, is unlimited, where the subjects to which it applies are within her jurisdiction." *"State Tax on Foreign-held Bonds"* case, 15 Wal., 319.

"These," says Judge Cooley, in his able and exhaustive work on Taxation, "are conceded or ad-

judged principles, and have ceased to be the subject of discussion or argument." 22.

The power of the State must then rest upon the proposition that these bonds are constructively within the jurisdiction of the State, although their owners have no residence here. Where a non-resident is the owner of tangible property, real or personal, which has its *actual situs* here, there is no doubt but that the jurisdiction of the State over such property for purposes of taxation is complete. This is true notwithstanding the fiction of the law that personal property has no *situs* but that of the owner. In such case the fact that the *actual situs* of such personalty is here authorizes the taxation.

Says Judge Story: "The general doctrine is not controverted that although movables are for many purposes to be deemed to have no *situs*, except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purposes of justice that the *actual situs* of the thing should be examined." Conflict of Laws, Section 500. Upon this ground the fiction as to the *situs* of personalty is overcome by an examination as to the *actual situs*; and the purposes of justice requiring that property, actually within the State and protected by the State, shall bear its just proportion of the expenses of government, renders its taxation legal and just. Cooley on Taxation, 2d Ed., 373, and cases cited by him.

The bonds sought to be taxed are undoubtedly property, and personal property. They are, how-

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ever, intangible property, and can have no *actual situs*. They are the mere evidence of debts by the company to the holder or owner thereof. The bond is evidence to support a demand for payment of money. Its destruction by accident would not discharge the debt. The debt would remain, and might still be demanded and recovered. *Kirtland v. Hotchkiss*, 100 U. S., 498. The bond is property, but it is the property of the owner—the creditor and not the debtor. It is not like shares of stock, which are not a debt, but which represent the interest owned by the stockholder in the profits of a business conducted here by his agents. The owner of the bond has no interest in the business of the corporation, and no control over it whatever. The losses of the business must be borne and its profits shared by the stockholder. In all this the creditor, by bond or otherwise, has no interest other than that which every creditor has in seeing his debtor preserve an ability to meet his debts. A tax upon the bond is not a tax upon the corporation. It is a tax upon the owner of the bond. Bonds are undoubtedly subject to taxation. But where? By what government? The answer cannot be doubtful. They can only be taxed by the government having jurisdiction of the owner. The *situs* of intangible personals, such as bonds, notes, accounts, etc., is necessarily the *situs* of the owner. This identical question was decided in the case of the foreign-held bonds already cited. The case arose under a Pennsylvania statute similar to our own, by which

it was sought to tax, in Pennsylvania, bonds owned by non-residents, upon the ground that they had been issued by a Pennsylvania corporation, and were secured by a mortgage upon property situated in that State.

Discussing this question of the *situs* of such bonds the court said: "Corporations may be taxed, like natural persons, upon their property and business; but debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditor. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. These debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no form of expression, could add any thing to its obvious truth." 15 Wal., 320. That these debts are secured by a mortgage upon property situated here can make no difference. The Supreme Court of Pennsylvania had sustained such taxation upon the ground that the *situs* of the security gave the State jurisdiction. *Malby v. Reading R. R.*, 52 Penn. St., 140. But this theory was repudiated, and its un-

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soundness demonstrated, in the case just cited from 15 Wal.

Upon this the court said: "The property mortgaged belonged entirely to the company, and, so far as it was situated in Pennsylvania, was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the corporation was in debt, or free from debt. The property in no sense belonged to the non-resident bondholder, or to the mortgagee of the company. The mortgage transferred no title, it created only a lien upon the property. Though in form a conveyance, it was both at law and in equity a mere security for the debt." 15 Wal., 322.

In this State, as in Pennsylvania, the mortgagee's interest in the mortgaged land is but a security for the debt—the debt being the principal and the land only an incident. *McGann v. Marshal*, 7 Hum., 121.

In Iowa, it was held that mortgages held by non-residents on property in that State were not subject to taxation in Iowa. *Davenport v. Railroad*, 12 Iowa, 539. So in California it was held that the owner of a judgment of foreclosure of a mortgage on lands could not be taxed in the county where the mortgaged lands were, he being a citizen of another county in the State. The debt being held to have only the *situs* of the owner, the

mortgage being a mere security. *People v. Eastman*, 25 Cal., 603.

That the legal fiction as to the *situs* of personals will, under certain circumstances, yield is most true. If the State had in the charter of this company authorized the issuance of bonds only upon condition that they should be taxable here, and this provision had been contained in the bonds and coupons, it could not be doubted that each purchaser would take such bonds with notice, and would by contract subject himself to taxation here. In such a case the purchaser would undoubtedly take this burden into consideration when he bought, and abate his price accordingly, and thus the tax would, as an incidence of such taxation, fall at last upon the debtor.

The fiction that debts have no *situs* but that of the creditor is founded upon a consideration of the nature of such property. It is not property save in the hands of the creditor.

"It is a certain rule," says Lord Mansfield, "that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other it may be contradicted." Cowp., 177. "No fiction," says Sir Wm. Blackstone, "shall extend to work an injury, its proper operation being to prevent a mischief or remedy an inconvenience which might result from the general rule of law." 3 Comm., 43.

To sustain the jurisdiction of the State over these bonds for purposes of taxation we must ignore or

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contradict the legal fiction which ascribes to such property the *situs* of the owner. If the actual *situs* upon examination should prove to be here, then the legal fiction must yield. But the actual *situs* is not here, and to sustain the jurisdiction we must create a fictitious or constructive *situs*, based upon the notion that debts are in some way property in the hands of the debtor, or that the security for the debt being here, that, therefore, the debt is here. By no sort of fiction can the jurisdiction of the State be held to extend to the property which a non-resident has in a debt which he holds against a resident. The creditor cannot be taxed because he is not within the jurisdiction, and his property cannot be taxed because it is not within the jurisdiction. *State Tax on Foreign-held Bonds*, 15 Wall., 300; *St. Louis v. Ferry Co.*, 11 Wall., 430; *Hoyt v. Tax Comm.*, 23 N. Y.; *Goldfast v. People*, 106 Ill., 25; *Commonwealth v. C. & O. R. R.*, 27 Gratt., 344.

Another question arises. The holders of such bonds are required to be assessed for county taxation and for city taxation at the place where the corporation is located. Now, may a citizen and resident of a county, other than that of the location of the corporation, be assessed for county taxation by a county in which he does not reside and in which he has no property? The same jurisdictional defect which prevents the State from assessing bonds of non-residents of the State exists with reference to the county. Davidson County has as-

sessed all the bonds issued by this corporation. This Act authorizes it. Can the Legislature authorize a county to assess, for county purposes, property not within the county? Is the Act valid in so far as it authorizes either the county or the city of Nashville to assess bonds owned by non-residents of the county or city? We have already decided that the *situs* of debts is that of the creditor and not that of the debtor. The Constitution authorizes the Legislature to empower counties and towns to assess taxes. This power has two limitations. The taxation must be applied to subjects within the jurisdiction of the county or the city, and it must be exercised only for county or municipal purposes. The State cannot empower a county or city to tax property not within the jurisdiction. The injustice which would result if it were otherwise would be most obvious. If Davidson County could tax the property of a resident of another county just because that property happened to be a debt due by a resident of that county, it would be a gross injustice. This consideration makes the conclusion we have reached upon constitutional grounds accord with every sense of right and justice. There are two other infirmities which attach to this part of this Act. The first is that the tax is imposed upon the holder of the bond. The corporation is required to reserve the tax from interest due. The bonds are coupon bonds and run for thirty years. Such coupons may be detached and are negotiable. If the coupon should be owned by



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A and the bond by B, the deduction of the tax from the coupon would be to compel A to pay the tax of B. This precise question arose and was determined in the case of *Hartman v. Greenbow*, when it was held that the tax against the bond was not collectable from the interest where it appeared that the coupon belonged to one and the bond to another. 102 U. S., 684. The second infirmity is this, the tax against non-residents of the State is void in toto. The tax of Davidson County upon bonds not owned in the county is void. The tax of the city of Nashville upon bonds not owned in the city is void. Now, when a coupon is presented for payment how is the company to determine whether it may lawfully reserve the tax from its interest payment? If the coupon does not belong to the owner of the taxed bond, it cannot reserve the tax. If it does not belong to a resident of the State it cannot reserve any tax. If it does not belong to a resident of Nashville it cannot reserve the city tax. If it does not belong to a resident of the county it cannot reserve either the county or city tax. The burden imposed by the Act upon the corporation, with respect to the collection of the tax lawfully assessed, is too onerous, and threatens grave injustice. It would have no way to secure itself against liability to either the bondholder whose interest it has illegally detained, or to the State for failure to reserve the tax justly due, except by requiring every coupon to be sued upon.

The whole scheme of the Act, in so far as it

undertakes to convert corporations into agencies for the collection of a tax upon their bondholders, is fatally defective and void. The Act is not limited to collection of State tax alone, but undertakes to provide machinery for collection of county and city taxes as well. The Act is so faulty as a scheme for collecting the tax on bonds that it cannot be sustained.

We therefore hold the Act invalid in so far as it impounds interest due by corporations, or imposes on them any duty or liability on account of the tax assessed upon their bonds.

Other objections to the validity of the Act in this particular have been argued, but it is unnecessary to pass upon them. The assessment against unknown holders of bonds is void. The assessment was made, as we have before stated, under the provisions of the law authorizing assessment of *omitted property*. The Act requires notice to be given to the tax payer, his attorney, agent, or representative. Notice was given to the corporation as the agent of the bondholder. Under the view we have taken of the Act the corporation is not the agent or representative of the bondholders, hence the assessment of these bonds as omitted property is void.

The judgment of the Circuit Court will be reversed in this matter, and as to the assessment on franchise or right of way, and affirmed in other particulars.

Costs will be divided as indicated by the Circuit Court.

## WEEKS v. MAYS.

(Nashville. February 28, 1889.)

ACTIONS. *Abatement and revivor. Breach of marriage contract.*

Action for breach of marriage contract abates upon defendant's death, and cannot be revived against his personal representative or heirs.

Code construed: § 3560 (M. &amp; V.); § 2846 (T. &amp; S.).

Cases cited and approved: 1 Pickering, 71; 4 Cush., 408.

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FROM WAYNE.

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Appeal in error from Circuit Court of Wayne County. E. D. PATTERSON, J.

R. A. HAGGARD and PITTS, HAYS &amp; MEEKS for Weeks.

BATEMAN &amp; BROYLES for Mays.

TURNER, Ch. J. On November 12, 1886, the plaintiff sued Stewart Mays for "a breach of contract of marriage and seduction."

After service of process, and before the appearance term, the defendant died. *Sci. fa.* was issued against his administrator and heirs, who appeared and moved to abate, and plaintiff, after dismissing as to the seduction, moved to revive.

The suit was abated, and plaintiff appealed.

It is insisted the suit should have been revived under Section 3560 (M. & V.) Code, providing: "No civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived."

"The defenses which may be urged against an action to enforce a promise to marry are very numerous, amongst them the bad character of the plaintiff, or his or her lascivious conduct. The cases generally exhibit this defense when the woman is plaintiff," etc.

If the defense be general bad character, evidence of reputation is receivable, "for," says Lord Kenyon, "character is the only point in issue."

"Public opinion, founded on the conduct of the party, is a fair subject of inquiry." 2 Parsons on Contracts, 5 Ed., 65.

The plaintiff, by her suit, necessarily tenders an issue as to her character. By her action she declares herself suitable for a wife, and the mother of a family, and invites the defendant to controvert her assumption.

Upon her character and conduct depend her chances of recovery. After the proof of the contract the first step of the plaintiff is ordinarily to undertake to establish a good name for virtue.

The first inquiry of the attorney on application to him to institute suit is, Can her character or conduct be sustained? Can they be assailed?

The suit, then, must be one "affecting the character of the plaintiff," and is within the exception of the statute.

Aside from the statute, the rule is, "The promise is so far of a personal character that the breach of it gives no action to the personal representative of the party injured, unless, perhaps, special damage to the estate of the decedent is alleged and proved. Nor does it survive against the administrator of the promissor." 2 Parsons on Contracts, 70; 1 Pickering, 71; 4 Cushing, 408.

Affirm the judgment.

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## ROBINSON v. QUEEN.

(Nashville. March 8, 1889.)

1. MARRIED WOMEN. *Validity of note executed in another State. Lex loci contractus.*

Married woman's note, executed and made payable in a foreign State, where she and the payee were domiciled, and under whose laws she was competent to make such contract, is valid and enforceable in this State.

The *lex loci contractus* controls.

Cases cited and approved: Bank v. Railroad, 2 Lea, 676; Bank v. Walker, 14 Lea, 299; Talmage v. Transportation Company, 3 Head, 337; Pearl v. Hansborough, 9 Hum., 426; 19 Ohio St., 260 (S. C. 2 Am. Rep., 395); 91 U. S., 406.

Cited and distinguished: 125 Mass., 374; 46 Miss., 618 (S. C., 12 Am. Rep. 319); 82 Ill., 450 (S. C. 25 Am. Rep., 334).

2. SAME. *Conveyance of separate estate. Husband's joinder in deed. Acknowledgement.*

Married woman owning separate estate, with unlimited power of disposition, may convey it under Act of 1869-70, Ch. 99, without her husband's joining in her deed; but such deed is void unless her privy examination is taken "before a Chancellor or Circuit Judge of this State, or Clerk of the County Court," as required by the Act.

Act construed: Acts 1869-70, Ch. 99.

Code cited: §§ 3347 *et seq.* (M. & V.); §§ 2486a-2486f (T. & S.).

Case cited: Sherman v. Turpin, 7 Cold., 382.

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 FROM RUTHERFORD.
 

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Appeal from Chancery Court of Rutherford County. W. S. BEARDEN, Ch.

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Robinson v. Queen.

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LELAND JORDAN, J. A. JONES, and E. F. SMITH-  
SON for Robinson.

JOHN E. RICHARDSON for Queen.

FOLKES, J. The first question to be disposed of in this cause is whether a married woman, domiciled in the State of Kentucky, is liable, in the courts of this State, upon a note made by a firm of which her husband was a member, and executed by her as surety for such firm, where, under the laws of Kentucky, she had, before the execution of the note, been emancipated from all the disabilities of coverture, and clothed with all the powers of a *feme sole*, so far as the right to contract and to sue and be sued were concerned.

This inquiry we answer in the affirmative.

Though some authorities may be found to the contrary, it may now be said to be well settled law, that the validity of a contract, the obligation thereof, and capacity of the parties thereto, is to be determined by the *lex loci contractus* (in the sense of the place of performance), unless there be something in the contract which is deemed hurtful to the good morals, or injurious to the rights of its own citizens, by the laws of the State or country whose courts are called upon to enforce the contract made in a foreign State or country.

The notes involved in this suit were made in Kentucky, payable there, the makers and payees resident there, and, as we have already stated, were

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valid there, and binding and enforceable against the married woman as fully as if she were a *feme sole*. See General Statutes of Kentucky, Article IV., Section 1, and Article II., Sections 6 and 7, where authority is given the Circuit Courts of that State to pass judgment of emancipation upon married women under certain circumstances therein set forth. A certified copy of such proceedings is exhibited in this record, showing compliance with the statute on the part of Mrs. Queen.

Under these facts what are the powers, and what is the duty of the courts of this State, when, by reason of the fact that the defendant has property in this State, we are called upon to enforce, as against the married woman, the collection of the amount due on the notes in question?

The general rule as to the enforcement by one State of a contract valid in the State where made, and to be performed, is not denied by the counsel for the defendant; but it is insisted that inasmuch as a note made by a married woman is void under the laws of this State, and inasmuch as it is the fixed policy of this State to throw around married women the shield of disability, we should not, under any supposed obligation of comity, entertain a suit predicated upon such a contract.

If this were a suit against a married woman, a citizen of this State, on a contract made out of the State, there would be much force in the insistence of the defendant. But here the law of the domicile is the same as the law of the contract, and we



merely encounter a conflict between the law of the contract and the law of the forum.

In such case, especially where the foreign law concerns the capacity of parties to contract, as affected by the disabilities of infancy and coverture, the *lex loci contractus* is to govern. Story's Conflict, Sections 103, 241. And although Chancellor Kent, in the early edition of his commentaries, seemed inclined to favor the contrary doctrine of the civilians, yet in the notes, afterward added, he unequivocally concurs in the conclusions of Mr. Justice Story. 2 Kent Com., 233, Notes 458, 459 and note. See also Whar. Conflict, Section 96.

See also a very elaborate consideration of the authorities in the able opinion of Gray, C. J., in *Milliken v. Pratt*, 125 Mass., 374, which, while it fully sustains our position here upon principle and authority, goes much farther than we are called upon to do in this case. That being a case where the married woman, domiciled in the State of Massachusetts where such a contract was void, made a note in Maine, by letter, and such a contract being valid in Maine, was enforced by the court in Massachusetts. It is valuable for its research and ability in the discussion of the question underlying the one now before us, and for this reason is referred to, without intending to approve or dissent from the point to which the discussion there goes.

Our own State has more than once recognized and enforced the principle which is controlling in this case. *Bank v. Railroad*, 2 Lea, 676; *Bank v.*

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*Walker*, 14 Lea, 299, 306; *Talmadge v. N. O. C. & T. Co.*, 3 Head, 337, 341-2; *Pearl v. Hansborough*, 9 Hum., 426, 433, 436. See also *Knowlton v. The Erie Railway Co.*, 19 Ohio Stat., 260; S. C., 2 Am. Rep., 395; *Scudder v. Bank*, 91 U. S., 406.

The case of *Bank of Louisiana v. Williams*, 46 Miss., 618 (S. C., 12 Am. Rep., 319), does not stand in the way of the conclusion we have reached, although some of its argument may seem to do so. There the obligation of the married woman was dependent upon a charter of a Louisiana corporation authorized to lend money to the "agricultural interest on notes and mortgages," and to make such contracts with married women and to enforce the same against their property. It was held that the Act in question contemplated the emancipation of the wife so far, and so far only, as to capacitate her to join with her husband in the "hypothecatory obligation." And while she thus subjected all her property dotal, as well as that embraced in the mortgage, it was not intended nor supposed that the obligation of the wife extended further than to cover her dotal and paraphernal rights and property in that State. As is said by the learned judge rendering the opinion in that case, "the transaction stands upon ground local to Louisiana, and a policy there which is exceptional from the general rule and general law. Assuming, as a doctrine of the law, that the contract of a married woman, valid at the place where made, shall be so regarded everywhere, does that embrace an obligation in-

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Robinson v. Queen.

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curred by her, growing out of special circumstances, and not included in the general law and policy of the place, but resting altogether on special reasons and *looking to local property for its payment?*" And continuing, it is said "if, by the law of Louisiana, a married woman was competent to incur debts generally, and coverture imposed no disability, it would be a different question from that we are dealing with." The case at bar presents exactly that "different question." Here, as we have seen, under the proceedings in Kentucky, the disability of coverture was absolutely removed and the married woman was authorized to contract debts generally.

It must be noticed also that in the *Bank v. Williams* the married woman was a resident of Mississippi at the time she made the Louisiana contract and at the time she was sued, which presents a very different phase of the question under consideration. Nor is there any thing in *Burchard v. Dunbar*, 82 Ill., 45 (S. C., 25 Am. Rep., 334), in any manner antagonistic. It merely holds that "where a contract of *an equitable character* is made in another State, in which there is no distinction between courts of law and equity, it can still be enforced in Illinois only in a court of equity." It recognizes fully the doctrine that a contract of a married woman, valid where made, will be held valid in another State, but decided that in enforcing such contract regard must be had to the forms of pleading in force in the State where the remedy

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is sought. In other words, the *lex fori* determines the nature of the remedy as to parties, forms, etc. Under this rule we act in requiring the husband to be a party defendant with the wife, as was done in the case at bar. While under the law of Kentucky this married woman has had her disabilities removed, and can contract, sue, and be sued as a *feme sole*, we recognize and enforce in this State so much of the foreign law as determines and fixes her liability, in other words the law of the contract; but in enforcing such liability in the courts of this State, if she is plaintiff, she must sue by next friend or with her husband; and, as defendant, her husband must be joined with her as a party.

Comity, as it is sometimes called, but more properly the rules of private international law, go no further than to require the recognition and enforcement of the law of the place of the contract; leaving to the State called upon to enforce such law, the use of its own forms and machinery, as far as the same can be adapted to the end in view.

Without pursuing this branch of the case further, the court is of opinion that the decree of the Chancellor dismissing the bill upon the ground that no judgment could be rendered against the married woman on the note is erroneous, and should be reversed and decree here made in favor of complainants for the full amount of the notes, with interest and costs.

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This brings us to the consideration of the second question presented in this record.

The bill herein not only attaches certain property of the married woman upon the statutory grounds, but seeks to set aside as fraudulent a conveyance made by the married woman to her brother and co-defendant, I. D. Miller, alleging that the conveyance was made to hinder, delay, and defeat complainants in the collection of their debt.

Much proof is taken, *pro* and *con*, as to the *bona fides* of the sale and conveyance to her brother. With the burden of proof on complainants, and the positive testimony of the parties defendant, we are unable to discover any thing more for the complainants than suspicions, predicated upon the relation of the parties, the apparent inadequacy of price, and the coincidence of the conveyance with the maturity of a part of complainant's debt, and the embarrassed situation of the husband at the time, all of which may be said to be sufficiently met and overcome by the defendant's proof, so far as the bill seeks to set aside for fraud the sale of the store-house and lot in Murfreesboro to I. D. Miller.

But it is charged in the bill that if such sale to the brother be not void as made in fraud of creditors, it is void and of no effect by reason of the fact that it was executed by Mrs. Queen, without her husband joining with her, and without privy examination. The record shows that the bill was filed on December 22, 1886. On the 21st of

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December the deed in question was registered. It was dated on the 18th of December, and on the same day acknowledged by Mrs. Queen before a Notary Public in Kentucky. It was not signed by her husband, and her acknowledgement is in the form prescribed by our statute for persons *sui juris*.

If such acknowledgement without privy examination is void, then the property having been attached in this cause as the property of Mrs. Queen is liable to be subjected to the satisfaction of the decree to be rendered against her. Is it void?

The status of this married woman, under the proceedings in Kentucky, whereby she was emancipated from the disabilities of coverture, however much recognized and enforced in this State, as to the validity of her contracts made in that State, cannot dispense with or in any manner effect our own laws with reference to the conveyance of real estate situated here, nor the prerequisites for registration of deeds as against creditors. So that we must look to the laws of our own State alone as determining the sufficiency of the acknowledgement of this deed.

There had been an ante-nuptial contract made between Mrs. Queen and her then contemplated and now husband, which was duly acknowledged and registered in Rutherford County, whereby the house and lot in question, as well as other property, was settled to her sole and separate use. It is insisted by her counsel that, as the owner of a separate estate, she has the power to dispose of her

realty by a deed without privy examination, under the authority of *Sherman v. Turpin*, 7 Cold., 382, and under the provisions of Section 3350 of (M. & V.) Code.

In *Sherman v. Turpin* it was held that privy examination is not necessary, and that the husband need not join in the deed conveying the wife's separate estate where the instrument creating the estate gives her all the powers of a *feme sole*. The language of the instrument in that case, as appears from the opinion, was as follows: \* \* \* "With power, at her pleasure to sell, convey, devise, or otherwise dispose of the same, in and when she may see proper, as fully as if she were a *feme sole*."

The marriage contract in the case at bar does not, in terms, give her the right to convey as a *feme sole*, the strongest language used in this respect being: "To her sole and separate use, free from debts, etc., of husband, with power to said Mary S. to use and dispose of the same as she may think proper, both the realty and the rents and income upon it, and the personalty, and the interest and income from it, and also with power to the said Mary S. to change the realty into personalty, or the personalty into realty, when and so often as she may think proper." So that the case is not controlled by *Sherman v. Turpin*, which is decided upon the particular language of the conveyance creating the estate, which, in terms, gave the right of disposition as fully as if she were a *feme sole*.

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Nor can this deed be sustained under the 3rd Section of the Act of 1869-70, carried into the Code (M. & V.), Section 3350, for if she would, under an instrument creating a separate estate, where the power of disposition is not withheld, have the power to convey without her husband joining with her, such conveyance would not be valid, unless her privy examination takes place before a Chancellor or Circuit Judge of this State, or Clerk of the County Court, as provided in the 2d Section of said Act, carried into the compilation of Milliken & Vertrees at Section 3347.

This deed, as we have seen, being acknowledged by the married woman before a Notary in Kentucky, is, therefore, ineffectual to divest her of her title to the property therein described, and the same was subject to the attachment in this cause.

The majority of the Court is of opinion, and decides, that under the Act of 1869-70, a married woman, owning a separate estate, where there is no restriction upon her power, is authorized to convey such estate, without her husband joining in the deed, where she has a privy examination before a Chancellor or Circuit Judge of this State, or Clerk of the County Court. Not deeming it necessary to decide this question, and not being able to agree with the majority, I would have preferred not considering here the effect of this Act in the matter referred to. The majority, however, think it important that the question should be settled, and that it fairly arises in this case in such manner as



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Robinson v. Queen.

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to justify its settlement. I content myself with saying that it may be admitted that the language of the Act is sufficient to justify such construction of it; but that this, like all other Acts of the Legislature, should be construed with reference to the evil intended to be cured, and that by so doing we are enabled to arrive at the intention of the Legislature, which is, after all, the cardinal rule of interpretation. Applying this rule, I am unable to resist the conclusion that the Act in question, so far as it relates to separate estates, was intended to put at rest the vexed questions as to the *powers of sale*, etc., possessed by married women over their separate estates, which a series of decisions in this State had rendered troublesome, beginning with *Morgan v. Elam*, in 4 Yerg., and on down to *Young v. Young*, in 7 Cold. The subject of her *powers* might well be settled without disturbing the *form* of her *conveyance*. And that in view of the jealousy with which our legislation, and that of our mother State of North Carolina, since the Act of 1715, has watched over and provided for the joint execution of deeds by husband and wife, we should not infer that the Legislature intended, in the Act in question, to deprive a married woman of the protection, from extraneous influence and ill-advised action, which the husband's presence would be likely to secure to her.

Without elaboration, I feel constrained to dissent from the holding of the majority of my brothers on the effect of the Act in question.

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Robinson v. Queen.

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This difference, however, does not affect the result already reached in this cause.

The decree of the Chancellor will be reversed, and judgment here for the amount of the notes, with interest and costs, and unless paid within the time to be fixed in the decree, the property attached, including the house and lot, will be sold to satisfy the judgment.

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Graham v. Gunn.

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GRAHAM v. GUNN.

(Nashville. March 12, 1889.)

1. LAND LAW. *Grant of land lying in two counties valid.*

Grant of land, lying "north and east of Congressional Reservation Line," issued in 1840,\* upon entry for 5,000 acres made under Act 1829, Ch. 85, and having its beginning corner in one county, but including lands lying in another county, is valid as to lands situated in both counties, although both entry and grant purport to be for lands lying wholly in the former county.

Acts cited and construed: Acts 1823, Ch. 49; Acts 1825, Ch. 28; Acts 1827, Ch. 46; Acts 1829, Ch. 85; *Id.*, Ch. 87. (See Vol. 2 of Haywood's & Cobbs' Statutes of Tennessee, pp. 118, 121, 123, 124.)

2. SAME. *Same. Recording copy of survey in other county.*

Such grant is not void as to lands lying in a county other than that in which the beginning corner of entry was located, by reason of the failure to record a copy of the survey of the entry in the entry taker's office of the "other county," as required by Acts 1825, Ch. 28, and 1827, Ch. 46.

This requirement of said Acts, even if essential to validity of the grant, had been, prior to 1840, abolished by Act 1829, Ch. 87, which substituted in lieu thereof the requirement "that the entry and survey shall not interfere with any other prior legal claim."

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\*We are not aware of any change, since 1840, in the law touching entries and grants of land lying in two counties. The "Congressional Reservation Line" was established by Act of Congress of 1806. Its calls are: "Beginning at the place where the eastern or main branch of Elk River shall intersect the boundary line of the State of Tennessee, from thence running due north until said line shall intersect the northern or main branch of Duck River; thence down the waters of Duck to the military boundary line, as established by the seventh section of an Act of the State of North Carolina, entitled, 'An Act for the relief of the officers, &c.' (passed in the year 1783); thence with the military boundary line west, to the place where it intersects the Tennessee River; thence down the waters of the river Tennessee to the place where the same intersects the northern boundary line of the State of Tennessee." (Haywood & Cobb, Vol. 2, pp. 13, 14.)—REPORTER.

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Acts cited and construed: Acts 1825, Ch. 28; Acts 1827, Ch. 46; Acts 1829, Ch. 87.

Case cited and distinguished: Crutchfield v. Hammock, 4 Hum., 204.

3. STATUTES. *Construction. In pari materia.*

Statutes *in pari materia* are to be construed together as one system.

This case affords a striking illustration of this rule.

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FROM DICKSON.

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Appeal from Chancery Court of Dickson County.  
G. H. NIXON, Ch.

LEECH & LEECH and T. C. MORRIS for complainant.

H. M. McADOO and T. J. FREEMAN for defendant.

LURTON, J. This is a bill to stay waste. The title of complainant is deraigned from a grant issuing in 1853. The title of defendants, by regular chain of conveyances, is traced back to a grant to J. C. King in 1840. There has been no such possession by either party as makes a title under the statute of limitations. The title of defendant is the superior one, unless the grant under which he holds is void, and this presents the question to be decided.

The King grant issued upon an entry made in

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an entry taker's office for Humphreys County in 1839, and both entry and grant purport to be for land lying in Humphreys County. A survey, however, shows that while the beginning corner, and a large part of the entry lie in Humphreys County, yet a part of the land entered and granted, *embracing that now in dispute*, laps over into the adjoining county of Dickson.

The contention of complaint is that the King grant is void as to so much of the land within its bounds as lies within the county of Dickson. The land in controversy lies north and east of the congressional reservation line, and north of the Tennessee River.

The Act of 1823, Ch. 49, which provides for the entering of the vacant lands lying in that district, provided for the election and qualification of one entry taker for each county in the district, and while the officer receiving the entry is not by that Act expressly prohibited from receiving an entry for lands which lie partly out of the county for which he is elected, yet it is argued that the authority and power of each entry taker is, by necessary implication, limited to the reception of entries for land wholly lying within his own county. The grant under which defendants claim purports to have issued under the Act of January 9, 1830, being Chapter 85. By Chapter 87 of the Acts of 1829, being an Act passed January 9, 1830, and the same day of the passage of the Act under which the King grant purports to have been issued,

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it was provided, "That where an entry has been heretofore made, or may hereafter be made, in any county in this State, under the law of 1823 and 1825, authorizing land to be entered at twelve and a half cents and one cent per acre, north and east of the congressional reservation line, and north of the Tennessee River, the beginning corner of which is in one county and a part of the entry in another, that it shall and may be lawful for the surveyor of the county where such beginning corner is situated to proceed and survey such entry agreeable to the calls, *provided* such entry and survey shall not interfere with any other prior legal claim."

The Acts of 1823 and 1825, referred to in this Act last cited, were Acts authorizing the entry of lands in the district embracing, among other counties, the two counties of Dickson and Humphreys. The Act of 1823 fixed the price to be paid by the enterer at twelve and a half cents per acre, and limited the quantity to be covered by one entry to six hundred and forty acres.

The Act of 1825 reduced the price from twelve and a half cents to one cent per acre. By the Act of 1827, Ch. 46, the quantity which might be embraced by one entry of lands in the district north and east of the congressional reservation line was increased to one thousand acres. By the Act of January 9, 1830, being the Act under which the King grant purports to have been entered, the quantity which might lawfully be included in one entry was increased to five thousand acres, and the

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provision in former acts requiring the enterer to pay one cent per acre was repealed, and the fees of the entry taker for taking an entry were reduced. These four acts all relate to one subject, and hence, are to be construed as parts of one whole. The Act of January 9, 1830, is obviously but an amendment of the Acts of 1823 and 1825 concerning the entering and granting of the vacant lands in this district. Now the Act authorizing the survey of lands where the beginning corner lay in one county and a part of the entry in another, refers not only to entries which *had* been made under the Acts of 1823 and 1825, but it was to operate prospectively upon entries *thereafter* to be made. The Act of 1830 is but an amendment of the Acts of 1823 and 1825, and we are of opinion that the Act passed upon the same day, which authorized the survey of entries beginning in one county and extending into another, applies to entries made under and by virtue of the Act of 1830.

The next objection urged to the validity of the King grant is based upon the provisions of the Act of 1825, Chapter 28, which is as follows: "That where an entry has been heretofore made in any county in this State, under the law of 1823, authorizing land to be entered north and east of the congressional reservation line, the beginning corner of which is in one county, and a part of the entry in another, it shall and may be lawful for the surveyor of the county where such beginning corner is situated, to proceed and survey such entry as in

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other cases, and a copy thereof shall be taken by the enterer to the entry taker's office of the other county, as the case may be, and be recorded therein, for which service of recording the entry taker shall be allowed one dollar." This Act related exclusively to entries theretofore made, and it had no prospective effect. But by the Act of 1827, Ch. 46, its provisions were extended to all entries thereafter made of lands north and east of the congressional reservation line. The entry upon which the King grant is based is not shown to have been recorded as provided by these Acts, and it is insisted that for this reason the grant is void as to the land embraced within its bounds which lies in Dickson County.

The Acts of 1829, Ch. 87, heretofore cited, does not contain any provision requiring the recording of the entry in the county into which the entry extends. The only limitation upon the latter Act is that "such entry and survey shall not interfere with any other prior legal claim." In all other respects the Act of 1830 is identical with the Act of 1825. The omission of the requirement that the enterer should record his entry in the "other county," is significant, and when we consider that in lieu of it is the proviso that such entry shall not interfere with a prior entry, we can but regard the latter Act as entirely substituted for the former, thereby abolishing the requirement as to recording such entries. But independently of this view we should be slow to hold that the mere failure of the en-



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terer to record such an entry in the other county, into which his entry extended, should have the effect of rendering the grant void. The Act relied upon does not, in terms, declare the entry void for failure to record it. The entry taker clearly had authority to receive the entry, and the surveyor to survey it. Neither the entry taker nor the surveyor were required to cause it to be recorded. The enterer was required to record it, but this was after the entry had been made and surveyed. To hold that a grant is void for failure of the enterer to so record his entry, would be going further in avoiding a grant on a collateral attack than any reported case has gone. The case of *Crutchfield v. Hammock*, 4 Hum., 204, is not like this case. In that case the entry taker had no power to receive the entry, and the principle is laid down that entries and grants are void, and may be resisted in any suit, where there is a want of property in the grantor, or want of power in the officers to receive the entry or issue the grant. Then there was no want of property in the grantor, or power in the officer, to secure the entry or issue the grant. The contrary conclusion as to the validity of this grant would, it is believed, result in incalculable injury and litigation. The lands of the State have probably all been long since granted, and now, after the Act of 1830 has been in force more than half a century, to hold a grant void because a part of the granted land lay in a county other than that in which the beginning corner of the entry is found,

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would probably disturb a vast number of very old titles. Every consideration of public policy forbids such a construction unless the plain letter of the law permits none other. We are of opinion that the King grant is valid, and the decree of the Chancellor must be reversed, and the bill of complainant dismissed with costs.



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF TENNESSEE,  
FOR THE  
WESTERN DIVISION.

JACKSON, APRIL TERM, 1889.

GREENLAW, Executor, v. PETTIT.

(Jackson. April 1, 1889.)

1. CHANCERY PLEADING AND PRACTICE. *Decree, based upon petition filed in pending cause, void when. Notice.*

Decree, in a pending Chancery cause, and between parties thereto, is void when based wholly upon matters presented by *ex parte* petition filed therein, which are not within the scope of the original pleadings—notice, of this new and independent suit made up within the old one, not having been given to or waived by the party sought to be thereby affected.

Cases cited and approved: *Easley v. Tarkington*, 5 Bax., 592; *Randolph v. Bank*, 9 Lea, 63.

2. SAME. *Same. Same. Solicitor's unauthorized appearance.*

In such case the solicitor of a party in the original cause has no authority, by virtue of his retainer, to appear for his client in defense of the petition.

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4pi 23

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3. SAME. *Decree making compromise without consent of parties void.*

Chancery Court has no power to make compromise for parties *sui juris* without their consent. Decree undertaking to do so is void.

4. SUBROGATION. *Between joint debtors.*

A joint debtor, who has discharged any part of the joint liability for his co-obligor, is entitled, in the absence of contravening equity, to be substituted to that extent to all securities held by the common creditor.

5. SAME. *Same. Denied when.*

The right of subrogation, being a pure equity, will be enforced only in favor of a meritorious claim, and where it can be done without injustice to the debtor and his other creditors.

Hence it will be denied, especially as against other creditors, where the party made the payment upon the joint obligation, for which he seeks subrogation, agreeing to waive that right for a valuable consideration, or where he is indebted to the party against whom he seeks subrogation in a larger sum than that paid.

Cases cited and approved: *Belcher v. Wickersham*, 9 Bax., 120; 8 Penn. St., 347.

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 FROM SHELBY.
 

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Appeal from Chancery Court of Shelby County.  
W. W. McDOWELL, Ch.

METCALF & WALKER for complainant.

GANTT & PATTERSON for respondent.

LURTON, J. On October 21, 1872, W. B. Greenlaw and M. J. Wicks were indebted, by open account, to the defendants, R. T. Wilson & Co., in the sum of \$47,014.50. The debt, having been contracted

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Greenlaw v. Pettit.

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and payable in New York, bore, by agreement, interest at the rate of ten per cent.

On the 12th of February, 1873, Wicks paid \$6,400 on this debt, leaving due March 31, 1873, \$42,633.56. On the latter date W. B. Greenlaw delivered to R. T. Wilson & Co. the five notes of himself and H. L. Brinkley, each for \$4,947.01, due respectively on the 4th days of November, December, January, February, and March thereafter. These notes aggregated \$24,735.06, and were secured by a mortgage upon Brinkley's property. These notes, amounting to one-half of the original debt and interest due from Greenlaw & Wicks, were accepted as payment *pro tanto* of the joint account, and duly credited as a payment and extinguishment of that amount of the joint debt. This left a balance which, with interest, amounted, on the 31st of March, 1874, to \$19,688.55. On the 30th of March, 1874, Wicks paid on this balance \$11,384.68; and on May 4, 1874, Greenlaw paid the further sum of \$1,700, leaving a balance May 31, 1874, of \$6,728.45, and this was the sum due on this joint debt at the date of Greenlaw's death in August, 1875. On the 24th of November, 1875, his executor—the complainant—paid, out of a policy of life insurance, the further sum of \$5,000, and on the same day Wilson & Co., from the individual deposit account of W. B. Greenlaw, transferred the sum of \$2,748.19 to the joint account of Wicks & Greenlaw, thus completing the payment of this joint debt. The proof shows that the notes of Greenlaw

*Greenlaw v. Pettit.*

& Brinkley, amounting to \$24,735.06, were, *as between* Greenlaw and Wicks, regarded as a full payment by Greenlaw of his one-half of the joint debt to R. T. Wilson & Co., and hence Greenlaw alone, as between himself and Wicks, undertook to pay off these notes. Before Greenlaw's death he had paid off in full one of these notes and upon another the further sum of \$1,166.64, and after his death Wilson & Co., out of his individual deposit account with them, applied the further sum of \$6,576.51, in equal sums upon the notes still outstanding.

The application of the individual account of Greenlaw to the payment of the balance of the account due from Wicks & Greenlaw and upon the unpaid notes of Brinkley & Greenlaw, was by virtue of an agreement between W. B. Greenlaw and R. T. Wilson & Co., and was assented to by the executor of the former. In addition to the sums paid directly to Wilson & Co. by Greenlaw, he paid the further sum of \$833.33, on account of expenses incurred by them in a litigation resulting from an effort to collect a collateral held by them as a security and belonging jointly to Wicks & Greenlaw. Thus the sums paid out by W. B. Greenlaw or his executor, on account of the joint liability of Wicks & Greenlaw, were as follows:

March 31, 1873 .....	\$24,735 06
May 4, 1874.....	1,700 00
November 30, 1874.....	833 33
November 24, 1875.....	5,000 00
November 24, 1875.....	2,748 19—\$35,016 58

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 Greenlaw v. Pettit.
 

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The sums paid by Wicks were:

February 12, 1873 .....	\$ 6,400 00
March 30, 1874.....	11,384 68—\$17,784 68

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Excess of payments made by Greenlaw .....\$17,231 90

Not including interest, the balance due from Wicks to Greenlaw on account of these overpayments on this joint debt would be \$8,615.95, being one-half of this excess.

Wicks & Greenlaw, in order to secure their joint indebtedness to R. T. Wilson & Co., assigned and transferred to them, in 1872, one-third interest in a claim for \$150,000 against the North and South Railroad Company, being a claim for commissions for sale of bonds issued by that corporation. They also undertook to give a lien on a lot in the city of Memphis at the corner of Union and Second Streets, in which they were at that time jointly interested, but which ultimately become the exclusive property of Greenlaw. In 1882, seven years after the death of Greenlaw, some \$48,000 was collected by R. T. Wilson & Co., on account of the interest of Wicks & Greenlaw in the claim against N. & S. R. R. Co. After paying out of this sum the balance, with interest, still due to them upon the notes of Brinkley & Greenlaw, there remained a balance of some \$22,000. This balance was claimed to be the interest of M. J. Wicks in this asset, *and, as such*, it was paid over to a receiver, appointed in a proceeding in the Chancery Court at Memphis, who has paid out the same to assignees of Wicks who held and claimed upon a transfer



made subsequent to that made by Wicks & Greenlaw to R. T. Wilson & Co. These assignees are not innocent purchasers for a valuable consideration, but are creditors of M. J. Wicks, and as such are entitled to hold only the interest of Wicks, whatever that may turn out to be, under the facts showing his relation to this joint debt, and as affected by the general balance as between Wicks & Greenlaw on that and other accounts.

Complainant's contention is, that he is entitled to be subrogated to the lien of R. T. Wilson & Co., on the interest of Wicks in the collateral held by them to secure the joint debt of Wicks & Greenlaw, and that this lien exists against the fund arising from collection of that collateral, and may be enforced against the assignees of the fund, they not being innocent purchasers, and therefore only entitled to Wicks' interest, subject to the lien claimed by him. That the fund must be treated as if in court, and complainant reimbursed out of it, for one-half of the excess of payments made by Greenlaw over those made by Wicks, upon the joint debt. Upon the facts so far stated complainant would seem clearly entitled to the relief he asks, but the situation is rendered much more complicated by certain defenses arising upon other facts now necessary to be stated.

In 1881 there was pending in the Chancery Court at Memphis a general insolvent bill for the administration in that court of the estate of W. B. Greenlaw. This bill had been filed by one Wallace,

claiming to be a creditor. R. T. Wilson & Co. had filed and proved their claim upon the unpaid notes of Brinkley & Greenlaw. On March 3, 1881, they filed a petition in the same case, suggesting that they were willing to compromise their claim against Greenlaw (assuming it to be half of the amount due on the Brinkley & Greenlaw notes) by accepting in satisfaction thereof Greenlaw's half of the claim for commissions against the North & South Railroad Company, being the claim held as collateral security upon the debt of Wicks and Greenlaw, as heretofore explained; and also the interest of Greenlaw in the Memphis lot heretofore mentioned. On this petition a reference was ordered, and the Master directed to report upon the advisability of the proposed compromise. The master, upon proof, reported that such a settlement was advisable, and on December 17, 1881, the court confirmed this report, and decreed to R. T. Wilson & Co. the one-half of the joint claim of Wicks & Greenlaw in the collateral held by the former firm, and Greenlaw's interest in the Memphis lot, in full satisfaction of all liability of Greenlaw's estate to Wilson & Co. About the same time an order was made appointing Mr. T. B. Turley receiver of the interest of M. J. Wicks in said claim, and authorizing him to collect or compromise it. On January 15, 1882, Mr. Turley, representing what was supposed to be Wicks' interest in said claim, and R. T. Wilson & Co., representing Greenlaw's interest, effected a compromise by which \$48,750 was received

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*Greenlaw v. Pettit.*

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in full of the one-third interest of Wicks & Greenlaw in this claim. One of the objects of this bill is to set aside this decree of compromise, and to recover the Memphis lot decreed to Wilson & Co., and to recover, out of Wicks' interest in the fund, arising from the collection of the collateral held by Wilson & Co., one-half of Greenlaw's payments made on the joint debt in excess of those made by Wicks. The Chancellor annulled the decree of compromise, and decreed that complainant was entitled to recover the Memphis lot, but refused any relief as against Wicks' interest in the fund arising from the collection of the claim against the railroad company. Complainant alone files the record here for error. The recovery of the Memphis lot from H. L. Brinkley, to whom Wilson & Co. had assigned it, is not now questioned, Brinkley not appealing from the decree of the Chancellor. The decree of the learned Chancellor annulling the compromise decree, by which the Memphis lot and Greenlaw's interest in the Wicks & Greenlaw collateral had been transferred to Wilson & Co., was clearly correct. The petition asking such compromise was never properly filed. The relief sought was not germane to the scope of the case in which it was filed. No notice of the filing of the petition was ever given the executor of W. B. Greenlaw. While it is true that the counsel who represented the executor in the insolvent bill did undertake to enter the appearance of his client, yet he did so without any authority, general or special. His retainer, by the

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Greenlaw v. Pettit.

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executor, as counsel in the insolvent proceeding, did not authorize him to appear for or bind his client in a new proceeding wholly foreign to the scope of the pleadings in the original case. Complainant was not a resident of the county of Shelby, and is shown never to have been aware of this novel and extraordinary petition for a compromise until long after the decree had been rendered and the fund collected and distributed.

The power of the Court to pronounce a decree in terms compromising a litigation between parties *sui juris*, and not based upon the express consent of the parties, is more than questionable. Courts exist alone to determine the right as between litigants, and not to compromise rights. A compromise *ex vi termini* means a contract. Courts are organized to administer remedies, and not to make contracts. The Chancery Court, in certain special cases, may authorize guardians, trustees, and others acting in a representative capacity to make contracts, but where parties are *sui juris*, no power exists in any Court to compel a compromise of rights by means of a decree or judgment.

In this particular case the facts upon which the Clerk and Master reported, advising a compromise, were not the real facts of the case. The petition did not in any sense contain the real state of the case, and yet it showed on its face that the same compromise had been rejected by the executor.

Aside from all questions of fraud, the decree was a nullity upon both grounds before considered.

*First.* That the matter presented by the petition was wholly beyond the scope of the original pleadings. It was a new and independent suit, made up within the old one, and no notice was given the party sought to be effected. A decree pronounced under such a state of facts is void. *Easley v. Tarkington*, 5 Bax., 592; *Randolph v. Merchants Bank*, 9 Lea, 63.

*Second.* It was void because it was not based upon consent, but in terms compelled a compromise between parties capable of acting for themselves.

The decree awarding to Wilson & Co. Greenlaw's one-half interest in the collateral held by them being annulled, leaves the matter in this situation: The fund resulting from the collection of this claim was \$48,750. Out of this Wilson & Co. were entitled to retain, as pledges, enough to satisfy the balance due them on the unpaid notes of Brinkley & Greenlaw, this collateral standing as a security for these notes, although they had been accepted as payment on the original joint debt of Wicks & Greenlaw. They claimed at the time that this balance amounted to \$26,764.36. This sum they accordingly applied to these notes. This left \$21,985.64, which was paid over to Mr. Turley, as Receiver of "Wicks' interest," as if the share or interest of Wicks in this fund, and this was, by the Receiver, paid over to assignees of Wicks, claiming under assignments subject to that made to R. T. Wilson & Co.

*Greenlaw v. Pettit.*

One contention of complainant is, that after the payment of Wilson & Co. the remainder of the fund belonged equally to Wicks & Greenlaw, and that one-half of this balance was the absolute, individual property of his testator, and that it, having been improperly paid over to assignees of Wicks, may be now, in this proceeding, reclaimed and recovered from such assignees.

All other questions out of the way, this might be conceded. But whether complainant is entitled to such a decree will depend upon a number of other considerations.

*First.* We have already stated that, as between Greenlaw & Wicks, the notes of Brinkley & Greenlaw were to be regarded as a payment by the former of his one-half of the joint liability, and he, of course, would be bound to pay and discharge these notes. If Wicks had subsequently paid the remainder of the joint debt after it had been credited with the Brinkley & Greenlaw notes, there would not have arisen any claim in consequence of an excess of payment made by Greenlaw. The payments of each would have been equal, Greenlaw alone being bound to pay off the Brinkley & Greenlaw notes, they having been accepted as a payment by him upon the joint debt. But Wicks did not pay off the remainder of the joint debt. Upon the contrary, as we have already shown, Greenlaw subsequently paid \$8,615.90, which Wicks was bound to pay as between them. On the other hand, Greenlaw alone was bound, as between him-

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*Greenlaw v. Pettit.*

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self and Wicks, to pay off the notes of Greenlaw & Brinkley. The sum necessary to discharge them should, therefore, as between them, be charged only to Greenlaw's interest in the fund arising from collection of the collateral jointly owned by them. Clearly it follows that Greenlaw's one-half interest in this fund was, therefore, rightly applied to the payment of his own liability. The claim, therefore, that Greenlaw's estate was the absolute owner of one-half the fund left after the debt of the pledges had been paid, cannot be sustained, and if complainant is to have any relief it must be upon some other basis. Indeed, the surplus of this collateral belonged alone to Wicks, and passed to his assignees, unless Greenlaw has some equitable lien thereon, by reason of his excess of payments on the joint debt for which it was pledged as a security. If any such equitable lien exists it must depend upon complainants' right to be subrogated to the lien of R. T. Wilson & Co. upon this collateral, or the fund arising from its collection.

The debt was a joint debt. The collateral was a joint asset. Each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay, and as a surety for his creditor as to that part of the debt which ought to be discharged by him. He has the same right to be subrogated to the securities held by the creditor which exists in behalf of a surety who pays in excess of his share of the joint burden. Sheldon on Subrogation, 200.

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Greenlaw v. Pettit.

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The right of complainant to the relief he seeks upon the doctrine just stated is resisted by defendant Pettit, who claims that the payments made by Greenlaw in excess of his proportion of the joint debt were made under an agreement, made subsequently to Greenlaw's payment of his part of the original debt in the notes of Brinkley & Greenlaw, whereby he assumed and agreed to pay the remainder of the joint debt in consideration of his indebtedness to Wicks on other accounts. As between two joint debtors there may rest upon one the ultimate obligation of paying it, and in such case there cannot arise any right of subrogation, for the reason that the payment by the one whose obligation it was to pay, operates as an extinguishment of the debt and a discharge of all liens held by the creditor for his security. Sheldon Subrogation, Section 46.

On the contrary, Mr. Sheldon, in his very valuable work on Subrogation, says: "If, as between joint debtors, it has become the duty of one of them to pay the entire debt, the others, if they shall be compelled to pay it, will be subrogated to the securities and means of payment held by the creditors against the former, just as if they had been sureties of the former *eo nomine*." Section 170.

But whether this excess of payment by Greenlaw was due to an agreement between himself and his co-debtor that he would assume and pay off the remainder of the joint debt, is immaterial, if, as a matter of fact, the balance of accounts as between



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the joint debtors is in favor of the defendant at the time the equity of subrogation is sought. If a surety or joint obligator invokes the equity of subrogation he must do equity. The right of subrogation is a pure equity and is allowed only in relief of a meritorious creditor, and only when and where it does not conflict with the legal or equitable rights of other creditors of the common debtor. So, says Mr. Sheldon, the equity "will not be allowed to a surety who is himself indebted to his principal against whom he asks to be subrogated without his first satisfying such debt." *Ibid*, Secs. 112 and 107; *Neff v. Miller*, 8 Penn. St., 347.

This defense involves an examination into the general account as between the joint debtors, Wicks & Greenlaw. They had, for many years, been upon terms of most familiar business and social intimacy. They had been jointly engaged in many enterprises, and prior to the payments made by Greenlaw beyond his own proportion of the debt due to R. T. Wilson & Co., they held large accounts against each other growing out of other transactions.

In June, 1874, they undertook to have a settlement of their open matters and called upon an old mutual friend, Col. Sam Tate, to aid them in such settlement. They soon disagreed and entered into a written stipulation whereby they submitted all their accounts to Col. Tate for settlement, and agreed to abide by his decision. In pursuance of this arrangement the claims of each, and the pa-

pers relating to same, were turned over to Col. Tate. In the effort to reach a settlement before the submission, they had each made statements as to their claims and each had made admissions in the presence and hearing of Tate as to parts of the accounts between them. Col. Tate, who has been several times examined as a witness as to the accounts between these two gentlemen, says that he at the time took a memorandum of such items as they agreed upon. This settlement was not concluded at the time of W. B. Greenlaw's death in 1875, but Col. Tate, from the papers of the parties, and upon the admissions made mutually, and upon his personal knowledge concerning many of the matters, has undertaken to state the account between them. It is well enough to observe that we have not had the benefit of the testimony of either Mr. Greenlaw or Mr. Wicks, the former having died long before this controversy arose, and the latter about the time the bill was filed. In order that the full import of the admissions made by Mr. Greenlaw to Col. Tate at the time of the attempted settlement between himself and Mr. Wicks may be understood, it is important to call attention to the fact that on the *4th of May*, 1874, Mr. Greenlaw paid to Wilson & Co., on the joint debt of Wicks & Greenlaw, \$1,700, and this was the first payment made in excess of his proportion, and on the 1st of June, 1874, this attempt at a settlement was had and the admissions made by Greenlaw to Wicks in the hearing of Tate and relied upon by

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defendant, were made in the course of this effort to settle their mutual accounts. This item of \$1,700, Col. Tate says, was claimed by Greenlaw as a credit upon his general account against Wicks, and was admitted by the latter as a proper charge on such account. Tate further states, that *the balance then due to Wilson & Co. of \$6,728.45 was, by mutual agreement, assumed by Greenlaw, and that he then claimed and was allowed a credit for this balance so assumed by him on his account with Wicks.* These are two of the items which he says the parties agreed upon. This assumption of the balance of this joint debt he states was because Greenlaw was indebted to Wicks upon other matters. This evidence, as to the assumption by Greenlaw of this debt, is uncontradicted, and establishes the proposition that Greenlaw did, as between himself and Wicks, his co-debtor, assume the obligation of paying off the remainder of their joint debt to Wilson & Co. Having thus assumed and agreed to pay this debt, and having obtained a credit on his general account with Wicks for the sum thus assumed, can it be held that the subsequent payment of the debt by his executor entitles him to be subrogated to the security held by the creditor? This subsequent payment was in pursuance of the agreement and operated to extinguish the debt, and, as a consequence, discharged the liens which the creditor held for his protection. Plainly, there was no intention to be subrogated by the payment. If the facts and circumstances show definitely that at the time of

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payment the right of subrogation was not intended to be exercised, but on the contrary that the purpose was not to keep the debt alive but to extinguish it, then the right of subrogation cannot be held to exist. *Belcher v. Wickersham*, 9 Baxt., 120.

The assumption of this debt, and the agreement to pay it and take a credit therefor upon his general account, indicate that there was no intent to be subrogated.

If any consideration were necessary to support the agreement to assume the balance of the joint debt to R. T. Wilson & Co., it is found in the state of the accounts between these parties; and indeed, if the balance, upon a general accounting, be against the complainant, no subrogation can be demanded, regardless of the agreement to assume the Wilson debt.

The account, as stated by Col. Tate, shows a balance in favor of Wicks, including interest up to 1881, of \$10,798.29. In this Greenlaw is credited with his excess of payment on the Wilson debt.

One item of charge against Greenlaw is as follows:

January 3, 1873. To amount of my one-half of money advanced you for purchase of M. & L. R. R. bonds, second mortgage:

Total amount.....	\$77,780 60
My half.....	38,890 32
To interest from January 3, 1873, to June 1, 1881, eight years and five months.....	19,639 61
Total on this.....	<u>\$58,529 93</u>

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This entire charge is disputed, and it is the only disputed item in the account of Wicks against W. B. Greenlaw. If this item be correct, then the balance still due Wicks, after crediting Greenlaw with the payments made for him to Wilson & Co., is as above stated—something over \$10,000. The history of this claim is rather dimly disclosed by the testimony in the transcript. In 1870 or 1871 Wicks had advanced to Greenlaw, who had a large contract for the M. & L. R. R. R., the sum of \$77,780.60. This sum was to be repaid in second mortgage bonds of that road at fifty-seven and a half cents on the dollar. Probably a part of the bonds were delivered under the contract. Whether demand was made by Wicks for the remainder does not clearly appear. It is, however, stated by Col. Tate that the bonds were not delivered by Greenlaw because he had hypothecated them, and was not in a situation to redeem, and that finally the bonds became worthless by the insolvency of the Railroad Company, and the exhaustion of its property in payment of its first mortgage bonds.

In January, 1873, Wicks, then holding Greenlaw's obligation for the amount of bonds as above, made the following proposal:

“MEMPHIS, January 6, 1873.

“W. B. Greenlaw, Esq.:

“DEAR SIR:—I have advanced to you \$77,780.60, which I was to take in second mortgage bonds of M. & L. R. R. R. at fifty-seven and one-half cents on the dollar. This sum, together with the in-

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terest on the same, or interest coupons on the bonds, will amount to over \$80,000. I propose to release you from the payment of this sum on the delivery of the bonds to me if you will execute a satisfactory note to the Southern Security Co. for \$50,000, with seven per cent. interest, at twelve months, for me. If required I will allow my third interest in the stock in the lease of the M. & C. R. R. to go with your note as collateral security.

“Signed, M. J. Wicks.”

This proposition was accepted. Greenlaw, however, joined with him in the purchase of this obligation Col. Sam Tate and H. L. Brinkley. These three jointly executed the note required to be given the Southern Security Co.

To secure this note Tate, Greenlaw, and Brinkley placed with it as collateral certain interests in a lease on the Memphis & Charleston Railroad. They likewise pledged a similar interest owned by Wicks. The Security Company, the payees of this note, agreed to receive, in payment of the note, their interests in the lease in the event the note was not paid at maturity. The note was not paid, and the pledged interests in the lease were accepted as payment. Thus Wicks' interest was used by these purchasers of Greenlaw's obligation in payment of their note. Tate and Greenlaw had contracted with Wicks, that in the event they did so use his interest in the lease, that they would pay him for the same the sum of \$16,666.66, with interest at seven per cent., from January 6, 1873.

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When Wicks' proposition to sell Greenlaw's receipt (as it is designated in the record) was accepted, he executed and delivered the following paper :

"MEMPHIS, January 3, 1873.

"Received of W. B. Greenlaw, Sam Tate, and H. L. Brinkley, \$78,780.65, money advanced by me to W. B. Greenlaw on account of raising the road bed on the M. & L. R. R. R. through the Mississippi River bottom, which amount of money I was to receive in second mortgage bonds of said company, at fifty-seven and one-half cents on the dollar. I hereby authorize the said Greenlaw to deliver the amount of said bonds the above sum of money would have entitled me to have received to the said Tate, Greenlaw, and Brinkley. I was to have said bonds at the price named, with July, 1872, and January, 1873, coupons, to which the said parties are entitled, and I agree to return to said Greenlaw all the bonds I have received on account of said contract when called on, and upon delivery of the bonds to the parties aforesaid this receipt to be a full acquittance to the said Greenlaw for the money advanced by me on said bonds aforesaid.

Signed.

M. J. WICKS."

Col. Tate, between January, 1874, and June, 1874, paid his one half of the \$16,666.66 which he and Greenlaw were to pay Wicks in the event they used his interest in the Memphis & Charleston lease in the payment of their note to the Southern Se-

curity Company. This payment had been made by Tate before the assumption by Greenlaw of Wicks' portion of their joint debt to Wilson & Co., this debt having been assumed at the time of the attempted adjustment of their accounts on June 1, 1874. At the same time that Tate made this payment to Wicks he sold and transferred to him his interest in Greenlaw's original obligation. By the sale of this obligation, or "receipt," to Tate, Greenlaw, and Brinkley, Wicks had parted with his claim against Greenlaw, but by this subsequent re-purchase he re-acquired a one-third interest with original obligations. He likewise held Greenlaw's obligation to pay him \$8,333.33 on account of his use of his interest in the lease. And this is the situation in which this claim stood at the time of the attempted settlement between Greenlaw and Wicks, and at the time the former assumed, on account of his indebtedness to the latter, to pay the balance of the debt to Wilson & Co. We have heretofore stated that Greenlaw had delivered a part of the bonds to Wicks, and we have seen that the latter, when he sold the receipt, agreed to turn these bonds over to the joint purchasers of the obligation. The proof shows that these bonds were delivered to Tate by Wicks, and Tate returned them to Greenlaw, though the consideration does not appear.

The second mortgage bonds of the Memphis & Little Rock Railroad were a marketable security down to 1873, and worth fully if not more than the contract price, at which Wicks was to get them.



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After that date their value does not appear from the proof. From all the circumstances we are inclined to the opinion that this contract between Greenlaw and Wicks became a money obligation, and that Greenlaw's use of the bonds by hypothecating them, obligated him to return the money he had been advanced on their purchase. The circumstance of the purchase of his "receipt" for \$50,000 by himself and Brinkley and Tate, and his acceptance of the bonds once delivered on the obligation, tend to show that the parties themselves regarded the "receipt" as a money obligation, and not a mere sale of bonds then probably worthless. The item as charged to Greenlaw in the account, as stated by Tate, is, however, erroneous. He has treated the interest re-acquired by Wicks from himself as a one-half interest, when in fact it was but a one-third. To this, however, should be added \$8,333.33, amount due Wicks on account of his share in the lease. The account as thus corrected leaves the balance still largely in favor of Wicks. But if it be assumed that the "receipt" of Greenlaw is not a money obligation, and had not become one by any default with which Greenlaw is chargeable; if we assume on the contrary that the obligation of Greenlaw was merely to deliver these bonds upon demand, and that no demand is shown by the proof to have been made, then the matter would be in this situation: Wicks, in June, 1874, was entitled to call on Greenlaw for such an amount of the second mortgage bonds of the M. &

L. R. R. R., as one-third of \$78,000 would buy at fifty-seven and a half cents on the dollar. Greenlaw did not then have the bonds to meet the demand, having hypothecated them instead of holding subject to his contract of sale. In view of the liability to Wicks, and his inability to redeem the bonds he had sold, he assumes to pay Wicks' portion of the joint debt to R. T. Wilson & Co., and take a credit therefor in a settlement with Wicks of this bond contract, and the other matters unsettled between them. The consideration is abundantly sufficient to support his agreement, and clearly operates to defeat any claim for subrogation, whereby the claims of equally meritorious creditors would be defeated, creditors *who took assignments after Greenlaw had assumed to pay the balance of the Wilson debt, and had been allowed a credit for it, as if it had in fact been paid, in his account with Wicks.* There is no error in the decree of the learned Chancellor, and his decree must be affirmed, with costs.

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Erie Dispatch v. Johnson & Guinee.

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ERIE DISPATCH v. JOHNSON & GUINEE.

(*Jackson*. April 4, 1889.)

COMMON CARRIERS. *Contract affecting measure of damages. Not applicable to a conversion.*

The ordinary measure of damages, to wit, the market value of the goods at place of destination, less freights, is applicable to a case where the carrier has been guilty of a conversion, although the bill of lading contain a stipulation that the carrier, in case of loss, shall be liable only for the value of the goods at time and place of shipment. Such stipulation, if valid, does not cover the case of a conversion by the carrier.

Case cited and approved: *Dean v. Voccaro*, 2 Head, 489.

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

POSTON & POSTON for Erie Dispatch.

H. C. WARINER for Johnson & Guinee.

CALDWELL, J. Johnson & Guinee were merchants doing business in the city of Memphis. They purchased a car load of lemons in the city of New

York, and put them in charge of the Erie Dispatch, a common carrier, for transportation to Memphis.

This action was brought to recover damages for a failure to deliver the lemons at their destination. Verdict and judgment were for the plaintiffs, and the defendant has brought the case to this Court by writ of error and supersedeas.

The declaration contains two counts, one for breach of contract to deliver the lemons, and the other for conversion.

The trial judge charged the jury that the measure of damages was the value of the lemons in the Memphis market at the time they should have been delivered, less the freight.

This instruction is assigned as error. Learned counsel for the appellant concedes that the instruction would have been correct as applied to a case in which there was no agreement between the contracting parties for a different measure of damages, but he insists that there was such an agreement in this case, whereby it is taken out of that rule.

The bill of lading stipulates that the measure of damages, in case of loss, shall be the value of the lemons in New York at the time of shipment, and the contention of the carrier is that this stipulation constitutes an exception to the rule of law stated by the trial judge, and determines the true criterion for the measure of damages in this case.

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*Erie Dispatch v. Johnson & Guinee.*

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This position is not tenable under the facts developed in this record. Though the bill of lading does contain the stipulation just mentioned, that fact could in no event be controlling in this case, because it was clearly shown on the trial that the Dispatch Company had been guilty of a conversion of the lemons by negligently delivering them to a merchant in Louisville, and thereafter contracting with that merchant to sell them and hold the proceeds for its account, which was done.

Without expressing an opinion as to the validity of such a stipulation in the case of an ordinary loss, we hold that it can, by no possible intentment or construction, apply to a case of conversion by the carrier, as this is. In such a case the carrier will not be allowed to receive any protection or advantage from such stipulation. It cannot be concluded from the language used that such a default by the carrier was in the contemplation of the parties when the contract of shipment was made, or that the stipulation was intended to meet a case like the one here presented, therefore this case is entirely without and beyond the scope of that stipulation, and is in no sense affected by it.

There being no dispute about the facts, which we hold constitute a conversion by the carrier, and the stipulation in question having no application where such a default is shown, the general rule of law, as administered in this State, must prevail, and it was proper for the trial judge to ignore that stipulation altogether, and give the jury the law

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applicable to a case where the parties have made no agreement whatever with respect to the measure of damages.

The charge is in accord with the rule laid down in *Dean v. Voccaro*, 2 Head, 489; Hutchinson on Car., Sec. 769; and Am. and Eng. Ency. of L., Vol. 2, page 905, and cases cited.

Affirmed.

3pi 494  
4pi 687

## RAILROAD v. SCOTT.

(Jackson. April 9, 1889.)

1. SUPREME COURT. *Practice. Several bills of exceptions.*

- Supreme Court will consider record of each trial separately and in order of time, where bills of exceptions have been taken upon several successive trials of a case in the lower Court.

Act cited: Act 1875, Ch. 106.

Code cited: §§ 3836-7 (M. & V.).

2. RAILROADS. *Killing stock. Statutory precautions. Charge of Court erroneous, when.*

The Court erroneously declares the law, and invades the province of the jury, where, in an action against a railroad company for value of animal killed by collision, he instructs the jury that observance of the statutory precautions *in any special arbitrary order, without reference to their effectiveness, under the particular circumstances, to prevent the accident*, will excuse the company from liability.

Code construed: § 1298, subsec. 4 (M. & V.); § 1166, subsec. 4 (T. & S.).

3. SAME. *Same. Same. Province of jury. Proper charge.*

It is for the jury—not the Court—to determine whether the railroad company has shown proper observance of the statutory precautions.

The proper instruction in such case is, that it was the duty of the company to observe all of the precautions prescribed by the statute, together with every other means at its disposal, to stop the train and prevent the accident; but if it was impossible, for want of time, to observe all the precautions, or if some precautions were, under the particular circumstances, more effectual than others, then the company must first observe those precautions, which, from their nature, are best calculated and most effectual, under all the circumstances, to prevent the accident.

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Cases cited and approved: Railroad v. Scales, 2 Lea, 688; Railroad v. Swayne, 5 Lea, 119; Railroad v. Thomas, 5 Heis., 266; Hill v. Railroad, 9 Heis., 827; Railroad v. Pratt, 85 Tenn., 13.

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

POSTON & POSTON for railroad.

L. W. HUMES for Scott.

FOLKES, J. This was an action by Scott to recover from the Railroad Company damages for the negligent killing of a mule by a train running upon the same while on its track.

There were two trials. The first resulted in a verdict for the railroad. A new trial was granted upon motion of plaintiff, to which action of the Court a bill of exceptions was taken, and duly filed.

At the second trial there were verdict and judgment for the plaintiff in the sum of \$135. New trial being refused, the Railroad Company has appealed in error.

The first error assigned is to the action of the Court in granting new trial.

The record shows that such new trial was



granted because of error in the charge. It is insisted that there was no error in the charge, and that the new trial was improperly granted, and that the Railroad Company is therefore entitled to have here a judgment in its favor on the first verdict.

The correct practice, under the Act of 1875, Ch. 106, carried into the M. & V. Code, §§ 3836 and 3837, authorizing a bill of exceptions to the action of the Court in granting a new trial is, when the case finally comes before this Court on appeal from the final judgment, at the succeeding trial, to first examine the record of the first trial so far as it concerns the action of the Court in granting the new trial. If the trial judge has committed no error in allowing such new trial (and very much is necessarily left to his discretion, especially where he is dissatisfied with the verdict), this Court will refuse to disturb his action thereon, and will pass to the consideration of the record of the second trial.

If, on the other hand, the trial judge has committed manifest error in setting aside the first verdict, this Court will enter judgment on such verdict, without looking to the record of the succeeding trial or trials.

Applying this rule, let us see what the record of the first trial discloses. It shows a case where a mule appeared upon the track some fifteen or twenty yards in front of a passenger train, the latter running at the rate of thirty miles an hour.

At this rate of speed, according to the testimony of the engineer, it would be impossible to stop the train under two hundred yards. The engineer immediately put on the air brakes, and reversed the engine, and by the time he had done this the animal was struck and killed. The engineer further testified that he was so close to the mule when she came upon the track that he had no time to do more than he did do to stop the train; that for this reason he did not blow the whistle nor ring the bell; that what he did was the best way to stop the train, and that the only effect the blowing of the whistle could have had was that it might have frightened the mule from the track.

This was all the evidence concerning the accident.

The Court charged the jury that "if the engineer was on the lookout ahead, and as soon as the mule appeared upon the track, the engineer put on the brakes, and reversed the engine, and that by reason of the close proximity of the mule to the train the engineer was unable to comply with any other of the statutory precautions, or apply any other means to stop the train and prevent the accident, and that at the time of the accident the train was supplied with proper head-light (the accident having occurred in the night time) and all necessary and proper equipment for the running and stopping of the train, then you will find for the defendant."

This was error, for which the Circuit Judge rightfully granted a new trial.

It was manifest, from the uncontradicted, indeed from the only proof in the case, that the means employed to stop the train, while the best to accomplish that end, doubtless, were not the best to have prevented the accident under the circumstances. According to the engineer it was impossible to have stopped the train at the rate of speed it was going within the short distance that intervened, so that, where he did not have time to observe each of the statutory requirements, ordinary diligence demanded that he should have used those most likely to prevent the accident. The blowing of the whistle, as he admits, might have frightened the animal from the track, and should, therefore, have been resorted to; after doing this, he should have done the other things prescribed if he had the time.

Where he can do so he is required to use each and every precaution named in the statute, as also "every possible means to stop the train and prevent the accident."

Under the proof in this cause he may have used every means at his disposal "to stop the train," and yet not have used every means "to prevent the accident."

One of the means of preventing the accident, and perhaps the most effectual under the circumstances, was the alarm whistle, which might have frightened the animal instantly from the track.

The charge, as given, directs the jury to find for the defendant if, together with proper equipment,

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the engineer, after applying the brakes and reversing the engine, was, for want of time, unable to do any thing more, without regard to whether what was done was or was not prudent under the circumstances, so that the question of negligence under the particular facts of the case was virtually taken from the jury.

It should have been left to the jury to determine whether, under the facts as found by them, the engineer had complied with the statute.

And while they were properly told that the several statutory requirements need not necessarily be complied with in the order in which they are enumerated in the statute, they should likewise have been told that where it was impossible to observe each of them, by reason of the suddenness of the appearance, and the proximity of the animal, such of them should have been resorted to as were best calculated to prevent the accident.

Such is manifestly the intent and meaning of the statute in question, and such is the common law rule as well. *Railroad v. Scales*, 2 Lea, 688; *Railroad v. Swayne*, 5 Lea, 119; *Railroad v. Thomas*, 5 Heis., 266; *Hill v. The Railroad*, 9 Heis., 827; *Railroad v. Pratt*, 1 Pickle, 13.

Having determined that the new trial was rightfully granted for error in the charge, let us see if there be error in the record of the second trial.

The proof was identical in this as in the first trial.

The Court, after reading to the jury the statute, continuing, said :

"If you find from the evidence that after the mule appeared upon the track, owing to nearness to the approaching train, the engineer, on the lookout, did not have sufficient time to observe all the precautions, then it was his duty to first sound the alarm whistle, and if he had time, next to put down the brakes, and then, if he had time, to employ every possible means to stop the train and avoid the accident; or, in other words, to observe the precautions in the exact order in which they are named in the statute, and for failure to thus observe them when plaintiff's mule so appeared upon the track, defendant would be liable."

This was error.

The statute requires the company to have "the engineer, or fireman, or some other person upon the locomotive, always upon the lookout ahead, and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

The Act also provides that a failure to observe these precautions renders the company liable, and places the burden of proof upon the company to show a compliance therewith; providing at the same time that, a compliance being shown, the company is not liable.

It is further enacted, that "where a railroad company is sued for killing or injuring stock, the

burden of proof that the accident was unavoidable shall be upon the company."

It is manifest that all of these provisions are to be taken as a whole, and construed together.

When so considered it is clear that there is nothing indicative of a legislative intent to render it obligatory upon the company, at all hazards, to observe the precautions in the order they happen to be enumerated in the statute.

In enumerating several precautions it was necessary that some should be placed before others, but this necessity does not warrant the idea that the order of statement renders imperative performance in the order stated.

The employment of "every possible means to prevent the accident" in all cases, and the burden of proof placed on the company in the case of killing or injuring stock, "to show that the accident was unavoidable," is, by the statute, just as imperative as the things enumerated.

Some of these means may be more efficacious, in particular cases, than others; and from the nature of the case it may be more prudent to resort to the precautions in an order different from that named in the statute.

For instance, if there was discovered upon the track an object known to the engineer to be incapable of hearing or moving, and there was not time sufficient to perform each enumerated precaution, it might be gross negligence to sound the alarm whistle at the expense of postponing the ap-

plication of the air brakes and reversing the engine.

On the other hand, in a case where the object was a man or an animal that might be frightened off, and when discovered the train was so near that at the rate of speed at which the train was moving it was impossible to stop before striking the object, it would seem to be equal negligence to apply the brakes and reverse the engine at the expense of postponing the alarm whistle, which might avoid the accident.

The Court should, therefore, have instructed the jury that it was the duty of the company to observe all of the precautions prescribed by the statute, together with every other means at its disposal, to stop the train and prevent the accident; but that if, by reason of the suddenness of the appearance of the obstruction upon the track, and the proximity and speed of the train, it was impossible to observe each of the precautions, then it was the duty of the engineer, or person in charge, to perform such of the requirements and precautions as, under all the circumstances, were best calculated, and most effectual, to prevent the accident.

There was no error in the refusal of the Court to give the first request for special charge made by defendant. It was substantially what was given at the first trial, and which we have pronounced erroneous. It assumed that the applying of the air brake, and reversal of the engine, were a sufficient compliance with the statute where there was not

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time to perform all the requirements, thus taking from the jury the question as to whether the resort to the air brakes, and reversal of the engine, were the most prudent things to be done under the circumstances.

The matter of the second special request is disposed of in what we have already said with reference to the main charge, and need not be mentioned further. It should have been given, with the qualifications indicated herein, by our statement of what should have been charged concerning the duty of the company under such circumstances.

For the errors stated the judgment must be reversed, and cause remanded for a new trial.



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Cumberland Telephone Co. v. Loomis.

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CUMBERLAND TELEPHONE Co. v. LOOMIS.

(*Jackson*. April 11, 1889.)

MASTER AND SERVANT. *Erroneous charge as to servant's duty.*

Charge to the effect that servant may assume that a telephone pole, which he is required to climb in due course of his employment, is safe, and suitable for that purpose, is erroneous in a suit brought by the servant for injuries caused by the breaking of the pole, in that it relieves him from the exercise of ordinary care for his own safety, and decides that he was not the company's "inspector" of poles—a disputed fact in the case.

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

TURLEY & WRIGHT for Telephone Company.

WATSON & HIRSH for Loomis.

SNODGRASS, J. The defendant in error sued for damages consequent upon an injury received while in the service of the Telephone Company, and repairing its lines, January 23, 1888. He was engaged in the removal of useless or dead wires, when the post upon which he was while doing this service broke off and threw him to the ground, whereby he was badly injured.

The negligence of the company averred was in providing an unsafe and unsuitable pole.

There were verdict and judgment in favor of Loomis for \$5,000, and defendant appealed in error.

Numerous errors are assigned, only one of which, as it is a fatal objection, we deem it necessary to notice, and that is to the following paragraph in the charge of the Court:

“Plaintiff had a right to assume that the pole upon which he was ordered to work in cutting away the dead wire was safe and suitable, and of sufficient strength to support the wires and cable suspended thereon, together with his weight, and it was not Loomis’ duty, when sent to cut away dead wires, to inspect the pole.”

The objection to this is two-fold. First, that it assumes as a matter of fact, and so decides, that Loomis was not the employe who should have served as “inspector” for the company, which was a disputed question of fact; and second, that it does not impose upon him, or rather relieves him from, the duty of ordinary care and caution in, by inspection or otherwise, ascertaining the condition of the pole, the extent of the danger, and guarding against it as far as reasonably practicable.

The charge is, in this connection, open to both objections, and it is generally subject to the last, as the Circuit Judge nowhere charges that plaintiff’s injury must not have been the result of the want of reasonable care on his part.

For the errors indicated the judgment must be reversed, and the case remanded for a new trial.

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McGhee v. Edwards.

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McGHEE v. EDWARDS.

(Jackson. April 11, 1889.)

LIENS. *Of mortgage superior to livery-stable keepers.* Lien on horse, created by registered mortgage, is superior to statutory lien of livery-stable keeper, who subsequently keeps the horse, without knowledge of the mortgage, and before its maturity, under contract made with mortgagor in possession.

Act construed: Acts 1868-9, Ch. 16.

Code cited: § 2760 (M. & V.); § 1993a (T. & S.).

Cases cited and approved: 28 N. Y., 252; 15 Bradw. (Ill.), 17; 55 N. H., 287; 33 N. W. Rep., 482; 30 Hun., 231.

Cited and distinguished: 126 Mass., 294.

Cited and disapproved: 21 Kan., 217-220; 36 Minn., 303.

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

THOMAS H. JACKSON for McGhee.

POSTON & POSTON for Edwards.

FOLKES, J. The only question presented in this record is, has the statutory lien of the livery-stable keeper, given by § 2760 of the Code (M. & V. Ed.), precedence over a mortgage duly registered before

the feeding of the horse, for which the lien was claimed.

The case was tried upon an agreed statement of facts, from which it appears that the mortgage was made and registered on December 19, 1887, that the debt secured was not due until March 19, 1888, and that under the terms of the mortgage the mortgageor was allowed to remain in possession of the horse until the maturity of the debt; that while so in possession he boarded the horse with the livery-stable keeper, who had no knowledge, in fact, of the existence of the mortgage; that the mortgagee was ignorant of the fact that the horse was being kept on feed at the livery stable; that after the maturity of his debt, the same being unpaid, the mortgagee brought his action of replevin to recover of the stable keeper the possession of the horse.

The trial judge gave judgment for the defendant, and the plaintiff has appealed.

Upon the question thus presented there is a conflict of opinion to be found in the books, while it has never been decided in this State.

We are to ascertain which of the antagonistic views is more in keeping with sound principles, and the better sustained by authority.

In arriving at the intention of the Legislature in the passage of the Act conferring the stable keeper's lien, we should regard the object and policy of our legislation with reference to the registration laws. The mortgage being registered,

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amounts *in law* to actual notice to all parties dealing with the property as fully, to all intents and purposes, as if the fact were placarded on the property itself, so far as the rights of the mortgagee therein are concerned.

To permit the mortgagor to encumber it to its full value, and consequent destruction to the mortgagee, is as fatal to the latter's rights, and defeats as effectually the policy of our registration laws, as if the former were allowed to sell it to a purchaser who was, in fact, ignorant of the mortgage.

Nor are we able to appreciate any considerations of public policy which lead us to extend to the livery-stable keeper any immunity from the fate of all who deal with property, the title to which is matter of record, with which they are not only chargeable with knowledge in law, but with which they can, through the registry laws, acquaint themselves in fact.

This being so, it is not for the Courts to give to the statute in question any such effect, unless constrained to do so by the language or manifest intention of the Legislature.

By our statute the livery-stable keeper's lien is not defined in terms, but it is merely provided that they shall have the same lien given in Article IV. When we turn to Article IV. we find that it relates to pasturage and season of male animals, and the lien given for such services by the Act is declared to be "the same as the innkeeper's lien at common law."

Now, it is true that at common law the innkeeper had a lien on the horse of a third party brought to him by a stranger and cared for at the inn, and even upon a stolen horse brought there by the guest, but this was, of course, in the absence of notice.

"If the innkeeper knows that the goods brought to the inn by a guest belong to another person, he can have no lien upon them for the guest's personal expenses," says Mr. Jones in § 502 of his work on Liens, citing *Johnson v. Hill*, 3 Stark, 172.

Again, if a manufacturer sends a piano to a guest at a hotel for his temporary use, and the hotel keeper knows that it does not belong to the guest, he acquires no lien upon it, citing *Broadway v. Granara*, 10 Ex., 417, 425.

So, also, it has been held, that an innkeeper has no lien on a horse placed in his stable by one not a guest, nor by his authority. Thus, in *Binns v. Pigot*, 9 C. & P., 208, it was held that if a person is stopped upon suspicion, and his horse is placed at an inn by the police, the innkeeper has no lien on the horse, and if he sells him for his keeping he is liable in trover to the owner. Jones on Liens, § 504.

It is also worthy of note that an innkeeper is bound to receive and entertain one who presents himself as a guest, while a keeper of a livery-stable is not bound to accept and provide for the horse of every customer who may present himself. *Munson v. Porter*, 63 Iowa, 453.

It was by reason of this difference that at common law the innkeeper had a lien, while the livery-stable keeper had none.

The lien of the latter exists by statute only, and in construing the statute now before us it is helpful to bear in mind these distinctions as shedding light upon the legislative intention; as also the further fact that our registration laws were unknown to the common law.

Mr. Jones, in his late work on Liens, with the adjudged cases on both sides of the question before him, says: "A chattel mortgage upon a horse is superior to a subsequent lien of a livery-stable keeper where the horse is placed in the stable by the mortgagor, after the making of the mortgage, without the knowledge of the mortgagee," citing therefor *Jackson v. Kosseall*, 30 Hun., 231; *Bissell v. Pearce*, 28 N. Y., 252; *Charles v. Neigelson*, 15 Bradw. (Ill.), 17; *Sargeant v. Usher*, 55 N. H., 287; *State Bank v. Lowe* (Neb.), 33 N. W. Rep., 482.

The learned author adds: "It is not to be supposed that a statute giving a lien for the keeping of animals was intended to violate fundamental rights of property, by enabling the possessor to create a lien without the consent of the mortgagee, when the person in possession could confer no rights as against the mortgagee by a sale of the animals. The keeper of animals intrusted to him by the mortgagor undoubtedly acquires a lien as against the mortgagor, but it is a lien only upon such interest in them as the mortgagor had at

the time, and not a lien as against the mortgagee, between whom and the keeper of the animals there is no privity of contract. The mortgagor, though in possession, is in no sense the mortgagee's agent, nor does he sustain to the mortgagee any relations which authorize him to contract any liability on his behalf. The statute cannot be construed to authorize the mortgagor to subject the mortgagee's interest to a lien without his knowledge or consent, as security for a liability of the mortgagor, unless such a construction clearly appears from the language of the statute to be unavoidable."

As stated in the outset, authorities are to be found holding a contrary view. See *Case v. Allen*, 21 Kan., 217-220; *Smith v. Stevens*, 36 Minn., 303, which were cases where an agister's lien was held superior to an older registered mortgage. But their reasoning does not commend them to us sufficiently to shake our conviction that the other view is the sounder and better.

Nor do we think that the rule which prevails with reference to railroad mortgages, that claims for fuel, rails, cross-ties, labor, and repairs take precedence over such mortgage, furnishes any analogy to the case at bar. They rest upon the principle or presumption of implied agency in the company to contract such liabilities, and discharge them out of the earnings of the mortgaged property, as contemplated by the mortgagee, and necessary to the operation and preservation of the property.

We do not mean to say that an implied agency



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might not arise out of the terms upon which the mortgagor was left in possession, which would authorize the mortgagor to contract with the stable keeper a lien that would, in the particular case, be superior to the claim of the mortgagee, which seems to have been the case in *Hammonds v. Danielson*, 126 Mass., 294.

But we see nothing in the agreed statement of facts in the case at bar that creates such an agency, and in the absence of such an agency, or some other authorization or recognition by the mortgagee, we hold his claim superior to that of the stable keeper, contracted with the mortgagor subsequent to the registration of the mortgage.

Let the judgment be reversed, and the case having been tried without a jury, judgment will be entered here for the plaintiff.

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 Whitzman v. Hirsh.
 

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## WHITZMAN v. HIRSH.

(Jackson. April 20, 1889.)

1. COVENANTS. *Warranty of title. Measure of damages for breach. Vendees and remote warrantor.*

A conveyed to B, by warranty deed, a tract of land for \$2,700. B divided it into twenty-six lots of equal value. He conveyed said lots by warranty deeds—two to C for \$500, and subsequently ten others to different persons for \$2,400, and the remainder to his assignee in bankruptcy. Then the entire tract was recovered by title paramount to A's. C sued A, his remote warrantor, for breach of covenant.

*Held*, That C could recover of A only two twenty-sixths of the price received by A for the entire tract, with interest from date of eviction.

Cases cited and approved: *Mette v. Dow*, 9 Lea, 93; 2 Dev., 83; 52 Iowa, 58.

2. SAME. *Same. Same. Same. Parties.*

In such case C can maintain suit against A without joining the vendees of the other lots. The covenant is divisible.

3. SAME. *Same. Same. Same. Failure of other vendees to sue.*

The measure of C's damages, in such case, is not affected by the fact that the other vendees fail to sue A, or suffer their actions to become barred.

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 FROM SHELBY.
 

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Appeal from Chancery Court of Shelby County.  
B. M. ESTES, Ch.

W. K. POSTON for Whitzman.

L. & E. LEHMAN for Hirsh.

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FOLKES, J. This is a bill by a vendee against a remote warrantor to recover damages for a breach of the covenant of general warranty contained in a deed.

The cause was heard upon an agreed statement of facts, from which it appears that defendant Hirsh, on July 19, 1870, for the consideration of \$2,700 then paid him, conveyed in fee, with general covenants of warranty, a certain tract of land to one Morris Kuehn; that on September 8, 1870, said Kuehn, by a duly registered plat, made a sub-division of said tract into twenty-six lots of *equal size and value*, numbering same from one to twenty-six inclusive; that on July 6, 1871, said Kuehn, for the consideration of \$500, paid him by complainant, conveyed in fee, with general warranty, to the complainant, two of said lots; that afterward said Kuehn sold and conveyed, with like warranty, ten other of said lots to sundry parties at different times, for an amount aggregating \$2,400, so that the twelve lots so sold and conveyed brought the sum of \$2,900, leaving said Kuehn fourteen of said twenty-six lots unsold; that afterward, on February 22, 1878, said Kuehn was adjudged a bankrupt under the Act of Congress, and an assignee appointed, in whom was vested the title to all of his property and effects; that on August 2, 1882, by a decree in the Chancery Court, Wm. M. Randolph was put in possession of the entire tract of land, under a title paramount to that conveyed by Hirsh to Kuehn; that no other suit has ever been brought

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against either Kuehn or Hirsh on account of the loss of title as aforesaid.

This suit was begun March 12, 1888, and the stipulation or agreed case was made August 16, 1888, the paper containing this further provision, "it is agreed that this stipulation shall be taken and considered as having been made at the date of the filing of the bill in this cause, and that the facts herein recited now exist—the intention of the parties being to preserve their respective rights—just as if the cause were tried on pleadings and facts subsequently established by proof."

The court was thereupon called to decide, "whether, if complainant is entitled to maintain the suit in his own name, and alone, against defendant (without bringing in the other vendees of other lots), the consideration money, which complainant paid Kuehn for the parts of said land which he acquired from the latter, constitutes his measure of damages against defendant, or whether complainant can only, if so entitled to maintain his suit, recover from defendant the relative value of said lots conveyed to him by Kuehn, in proportion to what they were worth on the basis of the price paid for the whole land to defendant by Kuehn."

The Chancellor adjudged that complainant could maintain the suit in his own name, and without making the vendees of the other lots parties, and rendered a decree against defendant for two twenty-sixths of \$2,700, the consideration received by Hirsh

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from Kuehn for the whole tract, with interest thereon from the date of the eviction, ruling that the amount of complainant's recovery should be limited to 'an aliquot part (in the proportion the number of lots bought by complainant bore to the whole tract sold by defendant) of the liability of Hirsh on his covenant.

From this decree the complainant appeals, assigning as error the action of the Court in limiting his recovery as above indicated.

The decree of the Chancellor is correct, and should be affirmed.

The covenant of warranty runs with the land, and is available to any one succeeding the covenantee by purchase or descent, and the action is well brought by him in whose time the breach occurs.

The evicted grantee may bring suit against the first covenantor, or against any intermediate covenantor; he may maintain separate actions against all, either at the same time or successively, and prosecute them to judgment; but he is, of course, entitled to but one satisfaction.

"The covenants are divisible, and their benefits will go to each recipient of any part or interest in the lands to which they relate, and may be sued on separately in respect of any breach as to the portion taken by him," says Mr. Sutherland, in his work on Damages, p. 295, citing authorities, among others, Dart on Vend. & P., 365, where it is said, "Where the estate is divided, as where it

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becomes vested in A for life, remainder to B in fee, and the breach of covenant affects the entire inheritance, each can sue for damages proportioned to the extent of his estate."

In Am. & Eng. Ency. of L., Vol. 4, p. 568, it is said, "Where A conveyed to B, by warranty deed, a lot of land, and B conveyed by like warranty to C one-half of it, and the whole was lost by title paramount to A, the latter was held liable to C only for that proportion of the consideration paid to A which the value of his portion of the lot bore to the whole lot, and that the burden was on C to establish this value," citing *Mischke v. Baughn*, 52 Iowa, 58.

Mr. Sutherland says, that "where the action is brought by a remote grantee, there is some diversity as to the criterion of damages."

But it is the settled rule in this State that the basis of recovery in such case is the consideration paid by the plaintiff to his immediate grantor, with interest, but not to exceed the consideration received by the defendant as remote vendor.

Thus, in *Mette v. Dow*, 9 Lea, 93, A sold an undivided moiety of a lot to B, his co-tenant, for \$4,500, with covenants of general warranty; some years afterward B sold to C the entire lot for \$3,000, with like covenants; subsequently C was evicted from the entire lot by title paramount. In an action brought by C against A the Circuit Court had rendered judgment in favor of C for

the whole \$4,500, the amount of consideration in A's deed to B.

This Court reversed the action of the Circuit Court, and rendered judgment for \$1,500, being one-half of the consideration paid by C to B for the whole lot. This Court saying, that "the covenant is a peculiar one, and not like an ordinary covenant for so much money. It is rather in the nature of a bond, with a fixed sum as a penalty, the recovery on which will be satisfied by the payment of the actual damages. Each vendor subject to this rule may be treated as the principal obligor to his immediate vendee, and as the surety of any subsequent vendee, to hold him harmless by reason of the failure of title, and the ultimate vendee, when evicted, is entitled to be subrogated to the rights of his immediate vendor against a remote vendor to the extent necessary to indemnify him. Such a vendee, to use the language of the North Carolina Court, sues a remote vendor on the covenant to redress his, the plaintiff's, own injuries, not the injuries of the immediate vendee of such remote vendor." *Williams v. Beeman*, 2 Dev., 483.

So that, where the remote vendor who was sued was a warrantor for only half of the land, though for a sum larger than the plaintiff paid for the whole, the recovery was limited to one-half of what the plaintiff would have been entitled to recover from his immediate vendor.

It follows, therefore, that if the plaintiff in the

case at bar sees fit to sue the remote vendor of the whole tract, instead of his immediate grantor, of two twenty-sixths of the whole, that his recovery should be limited to two twenty-sixths of the consideration received by such remote vendor, where there has been a failure of title as to the whole tract, thus rendering the remote vendor liable to the holders of the remaining twenty-four twenty-sixths of the land.

Our attention has not been called to, nor have we been able to find, any adjudged cases directly in point; but from the statement in the text-books, and by analogy with what has been settled, we have no hesitation in holding the decree of the Chancellor correct.

But it is earnestly insisted by counsel for complainant that, inasmuch as all other claims against Hirsh on account of his warranty are bound by the statute of limitations of six years, no suits having been brought within that period after the eviction, complainant is entitled to recover the full amount of his \$500 consideration money, the same being less than the amount of defendant's consideration money. And if wrong in this contention, he claims that Kuehn, having warranted the title in all his sales, and having sold only twelve lots for \$2,900, and retained the other fourteen lots, his, Kuehn's, right to resort to Hirsh's covenant would be postponed until his vendees of the twelve lots were fully satisfied, and that this complainant would therefore be entitled to recover two-twelfths of the



\$2,700, or twenty-seven twenty-ninths of the \$500 paid by him.

If we grant that the facts stated in the agreed case, make out a case where the other vendees are all barred, in the absence of proof that any of them are minors, or married women, or otherwise beyond the operation of the statute of limitations, the result we have reached would be the same. In an action on a breach of the covenant of warranty by one of several remote vendees, no supposed equities arise in his favor by reason of the attitude of the other vendees. Each, without regard to the other, is entitled to recover from the remote vendor the consideration paid by him to his immediate vendor, provided such recovery shall not exceed that proportion of the whole consideration received by the remote vendor which the value of the portion of the land lost by the remote vendee at the time of warranty by the remote vendor, bears to the original consideration received by the latter.

Applying this rule to the case in hand, the complainant is entitled, as the subsequent or remote vendee, to recover from the defendant only two twenty-sixths of the \$2,700 received by the latter for the whole tract—the land purchased by the complainant being, as we have seen, two twenty-sixths in value of the whole tract at the time of the sale by the defendant.

The amount thus reached is \$207.70, with \$77.46 interest from August 2, 1882, the date of the evic-

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tion, making a total of \$285.16, which is less than the consideration paid by complainant to his immediate vendor.

Such being the decree of the Chancellor, it will be affirmed.

Complainant will pay the costs of this Court.

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Railroad v. Bingham.

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## RAILROAD v. BINGHAM.

(Jackson. May 7, 1889.)

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1. BOUNDARY. *Call for side of street.*

Deed does not carry title to center of street, where it calls specifically for *side* of street.

Case cited and approved: Spain's case, Thompson's Tenn. Cases, p. —.

2. MUNICIPAL CORPORATIONS. *Powers. Authorizing use of streets for railroad purposes.*

Municipal corporations, empowered by their charters or otherwise to do so, may authorize the use of their public streets for railroad purposes.

Cases cited and approved: Railroad v. Adams, 3 Head, 598; Railroad v. Memphis, 4 Cold., 414.

3. SAME. *Same. Grading streets. Liability to abutting owners.*

Municipal corporations have power to grade, macadamize, or otherwise improve their public streets; and they incur no liability to abutting lot owners where, in the lawful and prudent exercise of this power, the abutting lots are rendered less valuable by reason of being left above or depressed below the common level.

Cases cited and approved: Humes v. Knoxville, 1 Hum., 408; Crawford v. Maxwell, 3 Hum., 477; Memphis v. Lasser, 9 Hum., 760; Nashville v. Brown, 9 Heis., 6.

Cited and distinguished: Gray v. Knoxville, 85 Tenn., 99; Pumpelly v. Greenbay, 13 Wall., —.

4. RAILROADS. *Grading and occupying streets under contract with city. Liability to abutting owners.*

Railroad company grading and improving street under contract with city, upon consideration of being permitted to construct its road thereon, is liable to owners of adjoining lots, *who do not own the fee in the street*, for such injury only, resulting from such grading and improvement of the street and construction of road, as the city would have been liable for if it had done the work itself.

*Aliter.* Where railroad is constructed on street in which abutting owners hold the fee.

5. SAME. *Lawful use of street. Abutting owners. Egress and ingress.*

Abutting lot owners, *who do not own the fee in the street*, cannot recover for injuries resulting to them from the lawful and reasonable use of

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a public street by a railway company, under the permission of the city, where their right of egress and ingress is left reasonably sufficient.

Cases cited and approved: Railroad v. Adams, 3 Head., 596; 38 Mich., 62; 10 Bush., 382; 73 Penn. St., 29; 21 Ill., 516; 79 Ill., 269; 33 Mo., 128; 35 Cal., 325; 12 Iowa, 246; 25 Vt., 67.

6. SAME. *Case in judgment.*

In street 44 feet in width, excluding sidewalks, railroad company laid two tracks—the outer rails of which were  $12\frac{1}{2}$  feet from curbing on either side. The iron rails were level with the surface of the street. On either side of the tracks there was sufficient space for passage of ordinary vehicles. About fourteen regular trains passed over these tracks every twenty-four hours. The street was entirely free from obstruction for greater portion of the time. This occupation and use of the street was authorized and lawful.

*Held:* That these facts do not constitute a taking, or material obstruction, of the easement of egress and ingress to which abutting lot owners are entitled in the street.

7. SAME. *Use of street in unlawful manner. Abutting owners.*

Abutting lot owners, who do not own the fee in the street, may recover of railroad company, operating its road by permission upon a public street, such damages as result to them from an unlawful and improper use of the street by the company.

8. SAME. *What is unlawful use of street.*

Under permission to operate its road upon a public street, a railroad company is not allowed to use the street for ordinary switching purposes, or to run its trains at illegal and dangerous speed, or to leave its trains standing unreasonably, or to park its cars thereon, or to suffer its engines to throw cinders, soot, and smoke unnecessarily upon adjoining premises. Such acts constitute a nuisance.

9. SAME. *Measure of damages for unlawful use of street.*

(As to measure of damages for such injuries see Harmon v. Railroad, post. p. 614.)

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

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Railroad v. Bingham.

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MORGAN & MCFARLAND for Railroad.

TURLEY & WRIGHT for Bingham.

LURTON, J. Mrs. Bingham is the owner of a block of lots fronting on Sixth Street, Memphis, upon one end of which she has erected four frame dwelling-houses. At the time she sustained the damage, for which she sues, she was in receipt of a monthly rental of forty dollars from these houses. After her property had been thus improved, Sixth Street, including that part in front of her tenements, was occupied by the Iron Mountain Railroad Company, by the construction thereon of two railway tracks, over which it passes its trains in reaching its depot in the city.

This suit was brought by her to recover damages sustained by her property in consequence of this use of the street by the railroad company. Her grounds of action are elaborately stated in her declaration, but for convenience in treatment of the many important questions presented, we will classify them under four distinct heads:

*First.*—Damages consequent upon the lawful and necessary use of a public street for railroad purposes.

*Second.*—Damages consequent from the grading of the street by the railroad company.

*Third.*—Damages by obstruction of her right of ingress and egress by lawful occupation and user of street by railway company.

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Railroad v. Bingham.

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*Fourth.*—Damages resulting from excessive and unnecessary and unlawful use of the street in front of her premises and amounting to a nuisance.

A jury being waived, the cause was determined by the Circuit Judge, whose special findings of law and fact are in the transcript, and judgment was rendered for plaintiff below for the sum of two thousand dollars. His Honor, the trial judge, found no special damages under the fourth classification, but did find that the depreciation in the value of Mrs. Bingham's property, by reason of the construction and operation of a railroad upon the street in front of her premises, was the sum of two thousand dollars. What part of this sum he found to be the consequence of the mere use of the street by the railway company, or of the grading of the street, or of obstruction to her easement in the street, we are left to conjecture, for his Honor has failed to make any separate findings of law or fact as to either of these matters, though requested so to do.

The deed under which Mrs. Bingham holds her property calls for the side of Sixth Street. The general rule undoubtedly is that a deed which merely calls for a highway or street carries title to the center thereof. This rule is in analogy to the doctrine that a grant calling for a stream not navigable carries title to the middle or thread of the stream. But where, from the language of the grant, it appears that the bank of the stream is intended to be the boundary, the title will be con-

fined within the intended limits. So if, from the terms used, it appears that the intent was to convey only to the street, such intent will be given effect. Such a conveyance as the one under which Mrs. Bingham holds, calling for the side of the street, has been frequently construed as not carrying the fee to the center of the street or highway. Spain's case, Thompson's Tennessee cases; Washburn Real Estate, side page 635 and note; 2 Smith's Leading Cases, side page 216.

Where the public have but a servitude in the street, the fee being in the abutter, the occupation of the street by the tracks of an ordinary steam railway seems, by the decided weight of authority, to be regarded as a new and distinct servitude imposed upon the fee, and if done without the consent of the owner, is a taking of his property for public uses within the constitutional provision requiring compensation. Am. & Eng. Ency. of L., Vol. 6, p. 552, and cases cited.

A correct interpretation of the deed, under which Mrs. Bingham holds her property, must confine her to the side of the street, and excludes the fee of the highway altogether. No part of her freehold having been taken or occupied by the railroad company, her damages must be limited to such injuries as she can show herself to have sustained as the owner of a mere easement in the street in front of her premises. What injury has she sustained, by reason of the use made of this street, for which she is entitled to recover damages? The

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Railroad v. Bingham.

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railroad is not a trespasser upon this street. The tracks now upon the street are there under license and authority from the city government. "The right of the legislative power," says Judge Wright, in the case of the *Tennessee and Alabama Railroad Company v. Adams*, "to authorize the building of a railroad within a town or city, or upon a street or other public highway, is not now to be doubted." 3 Head, 598; 4 Cold., 414.

The power of the Legislature to delegate to the municipal governments the right to license the use of a public street for railway purposes can no more be questioned than the first proposition. *Dillon Mun. Corp.*, Secs. 519, 558 to 560 inclusive.

The authority conferred by the law creating the peculiar local government of the city of Memphis is abundant to sustain the contract between the city and the plaintiff in error. The railroad company, in so far as its occupation and use of this street is permitted by its contract and the taxing district ordinances, is not a trespasser. What the law expressly authorizes is not unlawful, and can not be regarded as a nuisance. The running of railroad trains along a public street devoted to residential purposes, and without any actual obstruction of the right of an abutting owner to light or air, or ingress and egress to and from his premises, may in most cases be regarded as injurious to the property of lot owners. A resident upon such a street will undoubtedly be subjected to more or less discomfort and inconvenience by



the mere passage of trains in front of his premises. Unpleasant odors and disagreeable noises at inconvenient hours are likely to be experienced. Life will not be altogether so comfortable. But does the law give damages for such consequential injuries? To entitle a plaintiff to recover damages there must not only be an injury, but the injury must be the result of some wrongful conduct. Where an injury results merely from the lawful and reasonable use of a neighboring estate, no wrong is done and no remedy exists. By the obstruction of a view, or of light, or of air, or by the erection of an unsightly structure, or the conduct of a lawful business, injury may be inflicted upon an adjoining property, but as remarked by counsel, "in these and like cases there is an implied agreement by every one who is a member of civilized society, that he will submit to such consequential injuries without action." The streets of a town or city are the property of the public, and the public, acting through their authorized agencies, may apply them to any public purpose not destructive of their use as public thoroughfares.

The sound and well-settled rule is therefore that no action will lie by an abutting lot owner, who does not own the fee in the street, for injuries which merely result from the legal and reasonable use of a public street by a railway company, and which leaves his right of egress and ingress reasonably sufficient. *Tennessee & Alabama Railroad Company v. Adams*, 3 Head, 596; *Grand Rapids & Indiana*

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*Railroad Company v. Heisel*, 38 Mich., 62; *Railroad Company v. Coombes*, 10 Bush, 382; *Danville Railroad Company v. Commonwealth*, 73 Penn. St., 29; *Moses v. Pittsburg Railroad Company*, 21 Ill., 516; *Chicago Railroad Company v. McGinnis*, 79 Ill., 269; *Porter v. North Missouri Railroad Company*, 33 Mo., 128; *Carson v. Central Railroad Company*, 35 Cal., 325; *Millburn v. Cedar Rapids Railroad Company*, 12 Iowa, 246; *Hatch v. Central Vermont Railroad Company*, 25 Vt., 67.

The text writers with one accord seem to regard this a settled question. *Pierce on Railroads*, 234; *Wood on Railroads*, Vol. 2, 727; *Dillon Mun. Corp.*, Sec. 556; *Cooley Const. Lim.*, Sec. 555; *Rorer on Railroads*, Secs. 515, 518; *Am. & Eng. Ency. of L.*, Vol. 6, p. 553, and cases cited.

The next element of damages to be considered is that resulting from the grading of the streets, whereby the property of plaintiff in error has been left from two to five feet above the level of the street. The contract between the city and the railroad company required the latter to grade and pave Sixth Street, and to put down curbing and sidewalks. The company was required to do this work in consideration for its use of the street, and to do it contemporaneously with the laying of the track. The grade was to be furnished by its city engineer, and the iron rails were to be laid flush with the street as graded. This grading and paving was done under the supervision of the city's own engineer, and the work is admitted to be in strict

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accord with the requirements of the contract, and to have required an expenditure of about \$30,000. Sixth Street was but an old country road, never having been in any way improved or graded. The most substantial injury shown by the evidence, aside from the injuries purely the consequences of the lawful use of the street for railroad purposes, sustained by Mrs. Bingham, have resulted from the grading of the street in front of her premises. The right of a town or city to establish a grade for the public streets, and to cut down or fill up the streets to conform to such grade, is one of the most useful and important functions imposed upon such municipalities.

To quote from the decision of this Court in *Humes v. Knoxville*: "The corporation is the proprietor of the public streets of the town which are held in trust as easements for the convenience of the citizens. As such proprietor the corporation has the power to grade, macadamize, or do any thing else for the improvement of the streets, whereby they may be made to answer the end for which they were designated; and if, in the exercise of this power, the property of any individual shall be rendered less valuable, either by being above or depressed below the common level, it is *damnum absque injuria*, a casualty to which his property is necessarily subject, and for which the corporation is not responsible unless the injury has been inflicted either wantonly or from neglecting to use reasonable dilligence." 1 Hum., 408.

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This case is in accord with the line of decisions in other States, and has been more than once approved by this Court. *Crawford v. Maxwell*, 3 Hum., 477; *Memphis v. Lasser*, 9 Hum., 760; *Nashville v. Brown*, 9 Heis., 6.

The provisions of the Code, contained in Secs. 1392, 1393, and 1394, are probably applicable alone to corporations created under the chapter in which they are found, but even if of general application, they do not abrogate the rule as quoted, and do not affect any question in this case, no grade having ever been before established for this street, and there being no proof that Mrs. Bingham, before building, had applied to have a grade fixed.

The case of *Gray v. Knoxville*, reported in 85 Tenn., 99, has been pressed upon us by the learned counsel for defendant in error as in conflict with the former decisions of this Court.

Chief Justice Turney, who delivered the opinion of the Court in that case, in replying to the position assumed by the city, said: "If it was necessary for its public use that Asylum Street should be so graded for its drainage as to throw surface water on the property of plaintiff, thereby injuring his cellars, walls, shrubbery, etc., and in the work of grading the fences were knocked or tore down, it would be a taking and application to public uses to that extent." 85 Tenn., 101.

The decision, limited to the case thus assumed, is in no way inconsistent with our former adjudi-

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cations, and is in accord with the leading case of *Pumpelly v. Greenbay*, 13 Wall.

In the case now being decided, the grading of Sixth Street having been done for the city, and under its authority, the railroad company is not liable, unless the city would be.

But it is insisted that the grade furnished the company by the city engineer had not been adopted by any official act of the legislative council of the city, and that, therefore, it is not a lawful grade, and that, therefore, the city and the company are jointly liable for all consequential damages.

The declaration does not charge this grading to have been done illegally, or without municipal authority, and there is no proof whatever as to whether the grade established by the city engineer had been adopted by the municipal council.

In this state of the record, and in view of the fact that the grading was done under a contract signed by all the members composing the legislative council, we will not assume that the grade furnished the company by the city engineer had not been officially adopted in whatever mode was necessary to make it an official act.

We therefore conclude that Mrs. Bingham is not entitled to any damages on account of the grading of this street, there being no pretense that it was done in an improper or negligent manner.

The next contention is, that if it be conceded that the railway company has the legal right to maintain its tracks upon this street, and that it

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has been lawfully using these tracks for its usual and necessary business, that nevertheless this lawful use has so obstructed the right of ingress and egress as to amount to a destruction of her easement in the street. Excluding the sidewalks, the width of the street between curbing is forty-four feet. The tracks are two in number, and are in the center of the street. The space between each outer rail and the curbing is twelve and one-half feet. The iron rails are so laid as to be flush with the level of the street, and are therefore little obstruction to the ordinary use of the street. The clear space on either side of the tracks is wide enough for an ordinary vehicle when the tracks are in use by the company. About fourteen regular trains use these tracks each twenty-four hours. Thus the whole street is practically free and unobstructed for much the greater part of the time. The proof abundantly shows that since the tracks have been laid and the street paved, that its use for ordinary traffic has greatly increased in spite of the dangers and inconveniences incident to the movement of trains. That the street may not be so safe or agreeable for driving as without the railroad tracks is not to be disputed. But that the mere right of egress and ingress, which is appurtenant to every abutting owner on this street, has been destroyed or materially obstructed, is not proven by the facts of this case. The lawful and prudent use of the privileges conferred by the city upon this street to the railway company

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is not such as to amount in any sense to a taking of her right of easement in the public street, or to a substantial destruction of her rights therein. Not owning the fee in the street, she has no right of complaint so long as her right of egress and ingress is reasonably sufficient, where the occupation of the street by the railway company is lawful.

We come now to consider the allegations in the declaration which charge an unlawful and improper use of the privileges accorded the railway company under its contract with the city. The acts charged are: that the street is used for ordinary switching purposes; that trains are run at a dangerous and illegal speed; that trains are unreasonably left standing upon the street, thus obstructing it, and that cars are parked upon the street, and engines suffered to make great and unnecessary noises; and that smoke, soot, cinders, and steam are unnecessarily thrown upon her premises, by all of which illegal and unlawful conduct the operation of the road has become a nuisance, and greatly lessened the rental values of her property.

These things, if proven, would constitute a nuisance, and entitle defendant in error to recover such damage as she may have sustained up to the bringing of her suit. When a railroad company has obtained legal authority to put its tracks upon a public street, it must so use its privileges as to do the least possible injury to abutting property owners, and to the general public, who have an

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equal right upon the street. It must scrupulously avoid any violation of the contract under which its presence is permitted. The use of a street as a switch yard would not be authorized by an authority to lay down and operate a track for ordinary railway purposes. So the unreasonable stoppage of trains on a street, or the parking of its cars on the street, and any unnecessary noise or smoke, would be acts in excess of the use accorded, and therefore illegal and a nuisance.

Mr. Wood, in his work upon railroads, lays down what we regard as the sound and reasonable rule in the following words: "It may be stated as a general rule, that whatever is authorized by statute within the scope of legislative powers is lawful, and, therefore, cannot be a nuisance. But this must be understood as subject to the qualification that where an act that would otherwise be a nuisance is authorized by statute, it only ceases to be a nuisance so long as it is within the scope of the powers conferred. If the power conferred is exceeded, or exercised in another or different manner from that prescribed by law, it is a nuisance as to such exercise, or difference in the mode of its exercise. Whenever an act is authorized to be done in a highway that would otherwise be a nuisance, the person or company to whom the power is given is not only bound to exercise it strictly within the provisions of the law, but also with the highest degree of care to prevent injury to person or property of those who may be



effected by such acts." 2 Wood's Railway Law, 970.

The damages recoverable for such injuries as are now under consideration would, of course, be limited to such as has been sustained before the bringing of the suit. Being acts in excess of authority, and constituting a nuisance, their continuance ought not to be presumed. Diminution in value of her property could not be therefore looked to, though a loss of rental, if due to such nuisance, would be a proper element for consideration.

In actions for damage springing from a nuisance, one recovery would not preclude a second suit if the abuse should be continued. This question has been more fully discussed in the case of *Harmon v. Railroad Company*, decided at this term, opinion by Special Justice Dickinson.

The evidence upon this part of plaintiff's case is meager and contradictory. Occasional acts of abuse, such as we have mentioned, are shown to have occurred. The switching complained of has, for the most part, occurred upon another part of the street, and not in front of her premises. Trains have occasionally been run at a rate of speed prohibited by the contract and by the city ordinances. A good deal of whistling and bell-ringing has been done, but it is not shown that it was unnecessary to the safe movement of trains. The smoke and steam complained of does not appear to be more than that incident to the usual operation of a railroad. No special damage

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appears to have resulted from any of these occasional abuses.

The Circuit Judge, in his special findings, says that he was unable to find, from the proof, any special or particular damage resulting from these unlawful acts. The plaintiff having, however, shown occasional acts in excess of the lawful use of this street under the contract with the city, is entitled to nominal damages.

The judgment of the Circuit Court will be set aside, and judgment rendered here for costs and nominal damages.

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BIERCE v. JAMES.

(*Jackson.* May 7, 1889.)

PARTITION. *Of remainder and reversionary estates.*

Estates in land, in remainder or reversion, are subject, under our statute, to partition, or sale for partition, upon application of any person having an interest therein in common with others.

Code construed: § 3993, *et seq.* (M. & V.); § 3262, *et seq.* (T. & S.).

Cases cited and distinguished: *Norments, Admr. v. Wilson*, 5 Hum., 310; *Robertson v. Robertson*, 2 Swan., 197.

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FROM SHELBY.

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Appeal from Chancery Court of Shelby County.  
B. M. ESTES, Ch.

Two bills for partition dismissed on demurrer.  
Complainants appealed.

TURLEY & WRIGHT and SMITH & COLLIER for  
Complainants.

T. B. EDGINGTON and S. J. SHEPHERD for Re-  
spondents.

SNODGRASS, J. This cause, and the one heard with it (*Hatchett v. Wells*), involve different aspects of the same question in partition—that is, whether parties entitled to an estate in remainder

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or reversion, and not in possession together, are entitled to have it partitioned, or sold for partition, the life tenant joining in the application or resisting it.

The first cause stated was a bill filed to sell for partition twenty acres of land which was covered by a dower assigned to Mrs. E. C. Cooper (now Glenn), and by her conveyed to the defendant, E. A. Bierce, upon the allegation that complainant owned three-sixteenths of the property in remainder, as tenant in common with others who were made defendants, as well as Mrs. Bierce, the owner of the dower interest.

In the second cause the complainant alleged that he was the owner of four-fifths of two lots, and improvements thereon, of which Louis P. Wells, the minor defendant, owned the other fifth. That the lots were subject to the tenancy by the courtesy of L. W. Wells, father of defendant, and this life estate belonged to complainant.

The defense by demurrer to both bills was the same—that is, “that complainants, not holding and being in possession of the land with defendants, were not entitled to partition.”

The Chancellor held against the right, and complainants appealed. His decree was based upon the supposed authority of *Norment's Admr. v. Wilson*, 5 Hum., 310; *Robertson v. Robertson*, 2 Swan, 197; and the peculiar phraseology of § 3262 of the Code of 1858, defining the persons entitled to have partition, or sale for partition, as those “having an estate of

inheritance, or for life, or for years, in lands, and holding and being in possession thereof as tenants, in common or otherwise, with others." M. & V. Code, § 3993.

To determine whether or not this conclusion is correct, it is necessary to review the statutes preceding the Code, and embodied in it—no change having been made affecting the question under consideration since 1858—in connection with the decisions referred to.

Before this date several changes were made by which the very limited statutory right of partition between claimants "of the estate of an intestate" (Act 1787) was so enlarged and extended as to permit of partition, and sale for partition, not only of such estates, but of all estates held under will or deed, by tenants in common, or tenants in coparcenary, joint tenants, or otherwise.

The Code, with a slight change in phraseology, included the material provisions of all the various Acts preceding, in some instances by appropriate section, and in some by condensing several sections into one, by including in a single statement claimants and interests provided for in separate Acts.

This will be understood by a careful observation of the effect of the several Acts recited in detail hereinafter, and of the Code sections subsequently referred to.

The first Act on the subject is that of 1787. This conferred jurisdiction upon the Circuit and Chancery Courts to partition real estate of an in-

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*testate* on the application of one or more claimants thereof. It did not extend to other interests in land, either by deed or will, or to other persons than claimants of interests in the real estate of an intestate, and only authorized partition—not sale—of such interests.

The Act of 1789 extended the right to *partition* to tenants in common, and provided that “where real estate may be held by two or more persons as tenants in common, they shall and may have the same liberty and privilege of having their estates divided as is provided by the Act of 1787 for dividing the estates of intestates.”

In 1799 the partition law was so amended as to define the right of partition as extending to any “persons holding lands, tenements, or hereditaments in fee simple, or for a less estate as tenants in common, or as joint tenants, or in coparcenary or otherwise,” by providing for the mode of proceeding such persons should adopt in order to have partition.

The Act of 1815 authorized Commissioners appointed to divide real estate “held in joint tenancy or tenancy in common, and also the real estate of intestates in proportions of equal value and not quantity, as heretofore practiced. And the Act of 1817, so far only as lands inherited were concerned, extended the jurisdiction of the partitioning Court to every county in the State if the lands were situated in other counties besides that in which the application was made.

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By the Act of 1823 provision was made for assignment of dower in case of application for partition by the heirs of a decedent to whose widow dower had not been assigned.

Thus the law stood until 1827, when the right to sale for partition was given "to the heirs or legal representatives of any deceased person" who "shall inherit any real estate, and the same shall be so situated that partition thereof can not be made in the mode now pointed out by law, or where such estate may be of a description that it would be manifestly for the advantage of the heirs or legal representatives of such deceased person that the same be sold."

This right of sale was, upon the same terms, extended by the Act of 1829 to tenants in common with tenants in coparcenary.

It is enough to say of all these statutes that while at different times, and in different terms, provision was made for parceners, tenants in common and joint tenants, the effect of all was to permit partition or sale for partition in a proper case to all these tenants or holders of any undivided interests in connection with others, whatever it may have been.

Before considering the Act of 1854, and the Code provisions on the same subject, it is proper to examine the constructions put upon the statute as it stood when the two cases heretofore referred to were decided in 1844 and 1852. In the first, *Norment's, Admr. v. Wilson*, a purchaser at a partition

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sale filed his bill to be released. It appeared that the minors interested in the land as remaindermen were not made parties to the case in which the sale was made. The court held the sale void of course, but in the same connection said that the statute did not "contemplate partition by sale of reversionary interests, or interests in remainder, and could have no amplitude of construction."

Here it is obvious that being ascertained that the minor owners of the remainder were not before the court, no construction of the law in the aspect stated was necessary or material, as, however, it may have been the sale was void. The further opinion was *dictum*.

In the second case, *Robertson v. Robertson*, a petition was filed by the adult heirs of Peyton Robertson against the minor heirs and the widow in the Circuit Court of Davidson County to have the real estate covered by the dower of the widow partitioned. The widow alone was made defendant, and answered for herself, and as *guardian ad litem* for the minors, agreeing that the petition should be granted. Commissioners were appointed and set apart to the petitioners one-fourth each, leaving the other two-fourths undivided. The proceeding was instituted and completed at the same term without publication or notice. It was then brought to the Supreme Court on writ of error by petitioners.

The court decided the proceeding void upon several grounds:

*First*.—That notice was not given, under the



Act of 1799, which required at least ten days notice of the petition, nor publication in lieu for three months as required in the Act of 1831, a requirement not to be dispensed with in case of minors, whose appearance no *guardian ad litem* is authorized to enter.

*Second.*—Because the record does not show any appointment of a *guardian ad litem*.

*Third.*—Because the charging upon the shares of petitioners set apart to them the difference in their value and that of the undivided shares.

Here again it is obvious that after the decision of the question of *notice* and *absence of proper parties*, the other propositions were immaterial though definitely and positively stated in the form of decision as having once determined that such parties were not before the court as authorized it to partition at all, it is mere *dicta* to say what its proceeding might or might not have been if the proper parties had been before it.

But notwithstanding the two succeeding propositions after the first were *dicta* and unnecessary, the court did not content itself with them, but added two others in less positive form as grounds upon which the sale was void; one that it did “not believe the statutes authorize a partial partition of land,” and another to the effect that it did “not think our Acts on the subject of partition applied to interests in remainder or reversionary estates.” It is then stated *arguendo* that the exact question has not been decided, but that in the case of

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*Norment's, Admr. v. Wilson* it was decided that interests in reversion or remainder cannot be sold for partition. This *dictum* upon a *dictum* was supposed to have settled the question prior to the Act of 1854, and was treated as having settled it at that time in *Kindell v. Titus* (9 Heis., 742).

With this reference to the cases on that subject, made in order to fully present the condition of the question at the time of the passage of the Act of 1854, we return to that Act and state its material provisions. It provided that the partition laws of this State be so amended that when several persons shall hold or be in the possession of any lands, tenements, or hereditaments as joint tenants, or as tenants in common, in which one or more of them shall have estates of inheritance, or for life, or lives, or for years, any one or more of such persons being of full age may apply for a division or partition of such premises according to the respective rights of the parties interested therein, and for a sale of such premises if it shall appear that a partition cannot be made without great prejudice to the owners. That parties desiring it might have their shares set apart in severalty, leaving the shares of others, who so desire it, in common, and in case there are minors, the court may, in its discretion, set their shares apart in severalty or not, as appears just and right upon the proof, but in no case shall the fact that there are minors, and it is to their interest that their shares be kept together, deprive the other parties

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of their right to have their shares set apart to them in severalty.

That when the premises so held in common are subject in whole or in part to the incumbrance of dower, or of tenancy by courtesy, any one or more of the joint owners, being of full age, may apply for partition of said premises, and it shall be the duty of the court to order partition accordingly.

If commissioners report that exact partition cannot be made without injury to the parties, and that they have made partition as nearly equal as they can, and also report the value of each share or the sum necessary to be paid by some of the shares to equalize the others, the report shall be confirmed and lien given on the more valuable shares in favor of those taking the less.

This Act evidently intended to authorize the partition of remainder interests, and to remedy and do away with the construction given the former Acts on this question as well as upon the question of division into shares of unequal value in the case of *Robertson v. Robertson*.

From these several statutes the compilers of the Code undertook to form one, and the Legislature to enact, in it, a concise system of partition, with such eliminations and additions as were necessary for that purpose. (It is proper to say here that such sections of the Code as materially add to or change the law on this subject originated with the Code.) Brevity required the elimination of everything superfluous in expression, and much remodel-

ing of phraseology; system, the arrangement of the matter thus condensed and simplified in appropriately succeeding sections, in order that the various statutes on all subjects intended to be preserved, might be harmonized, made intelligible in relation, and brief enough for embodiment in the designed Code. This was accomplished admirably, considering the work as a whole, but in some instances, and notably in the chapter devoted to partition, not without obscurity and apparent conflict of meaning. For instance: The several statutes had treated of the right to partition in "claimants of the estate of an intestate," of "tenants in common," of "joint tenants," and "tenants in coparcenary," or other "representatives of an undivided estate." They had designated estates to be divided in different terms, as "in fee," "for life" or "lives," "for years," and otherwise, and the manner in which held as "inherited," "devised," etc., some statutes relating to one class of persons or estates, and some to another, and the last (Act of 1854) among other provisions, making still another change in limiting the persons seeking partition to those "of full age."

It was impossible to repeat all these terms and distinctions. It was also unnecessary to do so to preserve all the rights conferred in the several statutes. The compilers made, where practicable, a word speak a sentence, and a sentence represent a paragraph, or if possible a chapter. In the first section of the partition law, § 3262, they accom-

plished much in this way. That section provides for the persons dividing, and estates to be divided, in the briefest terms, in which are embodied the substance of all the former laws stated, with one most important verbal elimination from the Act of 1854, that of "full age" of the applicant.

The entire section, heretofore partly quoted, is as follows:

"Any person having an estate of inheritance, or for life or for years in lands, and holding and being in possession thereof, as tenant in common or otherwise, with others is entitled to partition thereof or sale for partition under the provisions of this chapter."

Part of this phraseology is from the Act of 1854, while part of it is a condensational improvement upon that of this or any preceding Act, but in the portion substantially copied from the Act of 1854 there is this change; the language "hold or be in possession of," referring to persons who may apply for partition, is changed to "holding and being in possession of" in the Code. It is argued, and the Chancellor so held, that this was an intentional change for the specific purpose of limiting the right of partition where there was no actual possession by the applicant for partition because of an intervening life estate, or of dower, or tenancy by the courtesy. But that this cannot be true is evident from the next section, which in terms declares "that the fact that the premises are subject to a life estate by dower or courtesy, or

to an incumbrance by mortgage or otherwise, will not affect the right." § 3263.

Now this latter section is from the Act of 1854, which first thereby in terms, and for that undoubted purpose, did authorize the partition of remainder estates. The Legislature of 1858 adopted the section from the language of that Act, except that after the word "premises" the words "in whole or in part," for clearness and brevity, are omitted in the Code, the sentence meaning the same without them, and the Legislature adding in the Code the further provision that an "incumbrance by mortgage or otherwise will not affect the right."

This section being (with a slight amendment which extended its scope) the substance of the original which expressly confers the right of partition of remainder estates, and the original being itself thus extended by amendment, it is impossible to construe the intention of the same Legislature adopting it to be to preserve it in such extended form, and solemnly enact it in a separate and independent section of the Code, after designedly destroying its force and purpose, and repealing it by the change of a conjunction in a former sentence in a preceding section.

The use of "and" for "or" was either an inadvertence of the compilers or the Legislature itself, or the result of a clerical error in copying or misprint, or not intended to be understood as implying that actual possession was necessary to a par-

tition, but only that there should be no adverse inconsistent possession.

It is superfluous labor, however, to speculate on the context and meaning of the word. It is enough to say of it that it was not intended to rob the chapter itself of the meaning and effect which whole sections succeeding, and antagonistic to that construction, give it. One of these sections we have already quoted and commented upon. With very brief comment we cite several others, which are absolutely conclusive of the question. They are as follows:

"The bill or petition (for partition) shall set forth as far as known the names of the owners \* \* \* describe the title by which the property is held and possessed, etc." § 3270.

"Every person having such interest, whether in possession or otherwise, and every person entitled to dower, if the same has not been allotted, shall be made a party." § 3271.

"If dower has never been allotted to the person entitled, upon petition for partition the same may, on motion, be allowed and set apart by commissioner, as in other cases." § 3289.

"In such case the entire tract, or tracts, including the part in which dower is assigned, may be partitioned among the claimants as hereinbefore provided." § 3290.

"The partition thus made is conclusive on all parties named in the proceedings who have at the time any interest in the premises divided, as owners

in fee or as tenants for years, or as entitled to the reversion, remainder, or inheritance of such premises after the termination of any particular estate therein; or who, by any contingency in any will, conveyance, or otherwise, may be, or may become entitled to any beneficial interest in the premises, or who shall have any interest in any individual share of the premises, as tenant for years, for life, by the courtesy, or in dower. \* \* \* " § 3291.

"Such judgment in partition will not affect any tenants or persons having claims as tenant in dower, by the courtesy, or for life, to the whole of the premises, nor preclude any person, except those specified in the last section, from claiming any title to the premises, or from controverting the title or interest of the parties between whom the partition has been made." § 3292.

"Any person entitled to a partition of premises under the foregoing provisions is equally entitled to have such premises sold for division in the following cases. \* \* \* " § 3293.

"The Court may, with the assent of the person entitled to an estate in dower, or by courtesy, or for life, to *the whole or any part* of the premises, *who is a party* to the proceeding, sell such estate with the rest." § 3305.

"If such person is incapable of giving assent, the Court may determine under all the circumstances, and taking into view the interests of all the parties, whether such estate ought to be excepted from the sale or sold." § 3306.



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The two sections last cited clearly imply, and treat it as a matter of course, that the partition proceedings may be for the partition of land, *all* of which is covered by a dower, tenancy by the courtesy, or other estate for life, and make provision for the sale of such life estate when "assented to" by the life-tenant, and also for the disposition of such an estate in *such suit* for partition when the life tenant is incapable of assenting, as in consequence of minority, insanity, or otherwise. And Secs. 3290 3291, and 3292, show clearly that dower interests, tenancies by the courtesy, and other life estates upon parts of the premises after division, and upon the whole of the premises before division were contemplated and provided for. In the former case the judgment in partition was made conclusive, in the latter, though such judgment could (and it was contemplated would) be rendered, and partition made between remainder-men, it was not conclusive upon, and did not affect the life-tenant of the entire premises so held in dower, tenancy by the courtesy, or otherwise.

That these statutes authorized partition of remainder interests has been assumed by the bar generally throughout the State, and this construction, practiced upon and tacitly approved by this Court, as such partition, has been long permitted here without objection. In consequence, many estates have been so partitioned, and numerous titles depend upon the construction. The precise question does not appear to have been before the Court,

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perhaps for the reasons stated, but the construction now given is not without text-book authority. Mr. Caruthers, than whose judgment respecting the statutes and practice of this State none was ever more valuable or more forcibly expressed, lends it the great weight of his opinion.

History of a Lawsuit, § 611.

We think it is clear beyond all question that the Code authorizes the partition of remainder estates. It is, therefore, not necessary to review decisions cited in other States, on statutes only in some respects similar to ours. It is enough to say that there is nothing in them which affects the view we have taken of our statute as a whole, and that so considered it is, properly, susceptible only of the construction herein given it.

The decree in each of the causes stated is therefore reversed, and they are remanded for further proceedings.

The costs will be paid by the appellees.

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 Pepper v. Telegraph Company.
 

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 3pi 554  
 4pi 396

## PEPPER v. TELEGRAPH COMPANY.

(Jackson. May 7, 1889.)

1. TELEGRAPH COMPANIES. *Negligent alteration of abbreviated telegram. Measure of damages. Due care and diligence.*

Telegram expressed in abbreviations understood by the transmitting company is not a "cipher dispatch;" and for negligent alteration thereof the company is liable to the sender for such damages—whether capable of being accurately foreseen or not—as resulted naturally and proximately from its default, and could not have been averted by due care and diligence of the sender. And the Court will not be very critical in examining the expedients adopted by the injured party, in good faith, to avert loss; and will impose upon the negligent company the burden of showing want of due care and diligence.

2. SAME. *Same. Sender not bound by alteration. Agency.*

Sender of telegram, altered in its transmission, is not bound to the receiver who accepts it according to its altered terms. The telegraph company has no power to bind the sender by any alteration of the message.

Cases cited and approved: 6 Ex. Ch. (L. R.), 7; 10 Ct. Sess. Cas., 35.

Cited and disapproved: 71 Ga., 760.

Cited and distinguished: 31 Minn., 481; 3 Abb. Pr. Reps. U. S., 408; 35 Barb., 463; 40 Wis., 431; 29 Vt., 127; 35 Penn. St., 298; 48 N. H., 487; 25 Kan., 410; 25 Ill., 591; 82 Ill., 73; 37 Miss., 682; 91 Ill., 298; 50 Vt., 316; 59 Ill., 58; 54 Md., 138.

3. SAME. *Same. Contract limiting liability for negligence invalid.*

The doctrine, enunciated in *Marr v. Telegraph Company*, 85 Tenn., 529, that a telegraph company can not limit its liability for damages caused by its negligence in transmission of messages, is re-affirmed.

4. SAME. *Same. Defeating sale. Measure of damages.*

Where sale effected by telegram is discovered, after delivery of goods, to be invalid by reason of the negligent alteration, by the telegraph company, of the seller's message, whereby the price was reduced, the company is liable to the seller for the difference between the real value of the goods and that price which the seller, by the exercise of due diligence, should, under the particular circumstances, have

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received. The difference between the prices named in telegram as sent and as delivered is not ordinarily the true criterion of damages in such case.

5. SAME. *Same. Same. Same.*

But the difference between the prices named in telegram as sent and as received may be taken as basis of company's liability, where there is no evidence in record to show that such basis is unreasonable or unjust.

6. SAME. *Same. Case in judgment.*

A proposed, by telegram, to sell B goods at a specified price. By negligence of telegraph company the proposition was changed so as to reduce price \$75. B accepted the altered proposition. A delivered and B accepted the goods in ignorance of the alteration. The company had limited its liability to price paid for message. There was no proof to show a more equitable criterion for damages than the difference between the prices named in telegram as sent and as received.

*Held:* That telegraph company was liable to the sender of the telegram for \$75—the difference between the prices named in telegram as sent and as received—there being no proof showing any better or more equitable basis.

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 FROM SHELBY.
 

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Appeal from Chancery Court of Shelby County.

**B.** M. ESTES, Ch.

CRAFT & CRAFT for Complainants.

TURLEY & WRIGHT for Respondent.

FOLKES, J. This is a suit by complainants to recover damages for a breach of a contract to

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deliver correctly a certain telegram entrusted to defendant as the owner and operator of a telegraph line.

The facts necessary to a correct understanding of the case are as follows:

On October 5, 1886, R. F. Bugg & Co., produce brokers at Birmingham, Ala., sent by defendant company to complainants, who were produce dealers at Memphis, this telegram: "Quote cribs loose, and strips packed." Thereupon complainant wrote out upon the usual printed blanks of the defendant company, and delivered to the proper agent of the defendant for transmission, this reply, addressed to Bugg & Co. at Birmingham, "Car cribs six sixty, c. a. f., prompt." The word "cribs" meant in the meat trade clear ribs, and c. a. f. meant cost and freight. These terms were well understood in the trade, and by the defendant.

This telegram, as delivered by the company to Bugg & Co., read "six *thirty*" instead of "six *sixty*," being in other respects correct.

Thereupon Bugg & Co. ordered a car load of the meat, amounting to twenty-five thousand pounds.

Complainants shipped the meat, and drew on Bugg & Co. for \$1,650, the price of the meat at six sixty. Bugg & Co. refused to pay the draft, relying on the telegram as received by them, and complainants accepted of them \$1,575, the value of the meat at the price of "six *thirty*," making a loss to complainants of \$75.

Complainants at once notified the company of

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the mistake, and that the same had entailed upon them the loss of \$75, and demanded payment of this sum, which the company declined to make.

The defendant, in its answer, says it is not liable—

*First.*—Because the telegram in which the error occurred fails to give any idea as to its true meaning, whereby defendant was unable to judge of its importance; that it can only be held liable for damages which it might reasonably have contemplated as a result of its error; “that it is not responsible for results flowing from a mistake in the transmission of such cipher dispatches.”

*Second.*—That the dispatch not being repeated their liability is, by the terms of the printed blank, which is the contract, limited to the cost of the telegram.

*Third.*—That in no event are they liable for the difference in the price contained in the telegram as received by it, and the price in the message as delivered by it to Bugg & Co.—*i. e.*, between \$6.60 per hundred pounds and \$6.80, claiming that complainants could have recovered their meat from Bugg & Co. as it was shipped in consequence of said mistake.

There was judgment for the complainants for the sum of \$75, with interest from the date of the delivery of the meat.

Defendant has appealed, assigning errors.

It is unnecessary for us to determine what is the measure of damages for error, in the transmission of a telegram written in cipher, a question

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upon which the authorities are not in harmony, and one where there are very many nice distinctions and refinements.

The telegram before us is in no sense in cipher. It is an abbreviation merely, and from the proof in the cause an abbreviation known to the company. It fully apprised the company that a proposition to sell clear rib meat in car load lots at \$6.60 per hundred pounds was made, and the company could reasonably have anticipated that if the proposition was accepted, the writer of the message would forward the goods in expectation of such price, and that his loss, if there was an error in delivering the message by the negligence of the company, would be the difference between the real value of the goods and the price at which the sender, in the exercise of reasonable prudence, might be able to dispose of them when rejected by the proposed purchaser in consequence of the error. In other words, the company knew that carelessness, or mistake, in the delivery of the message might expose the sender to pecuniary loss, the amount or extent of which it was not necessary for it to know. "It is only necessary that the damages be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is such as might naturally be expected to follow its violation," and it was only necessary for the company to know that the telegram related to a matter of business which, if improperly transmitted, might lead to pecuniary

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loss, upon the basis above suggested, to be increased or diminished according to the particular circumstances of the case, and to be determined upon the rule of compensation to the party injured.

The second matter of defense set up in the answer, predicated upon the terms of the special contract contained in the printed blanks of the company, need not be noticed since the case of *Marr v. Western Union Telegraph Company*, in 1 Pickle, 529—which settles in this State, in accord with the overwhelming weight of authority, that such stipulations will not avail the company where the damage has resulted from the negligence of its agents or officers.

The mistake, or error, here is clearly shown to have been occasioned by such negligence. Indeed, learned counsel for the company have not made any contention to the contrary in this court.

This brings us to the consideration of the third and serious ground of defense, the measure of damages in this particular case.

The contention of the counsel for complainants is, and such was the view of the learned Chancellor, that the company was the agent of the complainants as the sender of the telegram, and that the complainants were therefore bound to let Bugg & Co. have the goods at \$6.30, the price erroneously named in the dispatch as delivered; and that the loss must be measured by the difference between the price at which they were willing and expected to sell, and the price which, in con-



sequence of the error of such agent, they were compelled to sell.

In our opinion this contention cannot be maintained, either upon principle or authority.

The minds of the party who sends a message in certain words, and the party who receives the message in entirely different words, have never met. Neither can, therefore, be bound the one to the other, unless the mere fact of employment of the telegraph company, as the instrument of communication, makes the latter the agent of the sender. Upon what principle can it be said such an agency arises? The telegraph company is in no sense a private agent; it is clothed by the State with certain privileges—it is allowed to exercise the right of eminent domain. In exchange for such franchises it is onerated with certain duties, one of which is the obligation to accept and transmit over its wires all messages delivered to it for that purpose. The parties who resort to this instrumentality have no other means of obtaining the benefits of rapid communication, which is the price of its existence. They have no opportunity, and no power, to supervise or direct the manner or means which the company use in the discharge of their duties to the public, in the transmission of messages for particular individuals. They can only deliver to the company a legible copy of what they wish communicated, with no expectation that such paper is to be carried to the party addressed; and their connection with the company there and then ceases.

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They have contracted with the company to transmit the words of the message to the party addressed, through its own agents and with its own means. The party receiving the message knows that he is not obtaining any communication direct from the sender, but that he is receiving what the company has taken, and changed the form of, from the paper on which it was written, transmitted by electricity over the wires of the company, and reduced to writing at its destination by an agent of the company; and that it only represents *what was written* by the sender, in the event that there has been no imperfection in the mechanism of the company, nor negligence in the servants of the company. Knowing the scope of the employment, and the methods of transmission, the receiver should be held to know that the sender is bound by the contents of the telegram as received only so far as it is a faithful reproduction of what is sent. He knows, furthermore, that if he acts on the telegram, and it should turn out to have been altered by the negligence or wrongful act of the company, the latter is liable to him for such injury as he may sustain thereby.

Ordinarily there is no relation of master and servant between the sender of the telegram and the company. Where this relationship does not exist the principal is not responsible for the torts of the agent, and the negligent delivery of an altered message, when acted on by the receiver to his detriment, is a tort, for which the telegraph company alone is responsible.

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The company retaining exclusive control of the manner of performance, and of its own employees and instrumentalities, the sender of the message being absolutely without voice in the matter, it seems to us that the position of the company to its employer is that of "independent contractor," as defined and understood in the well-settled class of cases where the employer is held to be not responsible for the negligence of the contractor in the performance of his work or undertaking.

The many and marked differences between the employment of such companies to transmit a dispatch, and the employment of a private person to deliver a verbal message, are so manifest that we cannot assume the liability of the sender in the first instance, from his conceded liability in the last, for the negligence of the instrumentality employed.

Such a holding not only does violence to well-settled principles of the law of agency, but may lead to the absolute ruin of the party employing this useful and now necessary public medium of rapid transmission of intelligence, so that every consideration of public policy would seem to point to a different result, unless the courts find themselves constrained, by the great weight of authority, to uphold the contention here made.

How are the authorities?

In England and in Scotland the idea of agency in the company so as to bind the sender upon a telegram negligently changed in the transmission is repudiated. *Henkel v. Pope*, L. R. 6 Exch., 7;

*Verdin v. Robertson*, 10 Ct. Sess. Cas. (3d Series), 35.

Mr. Gray, in his work, while stating the law to be in England and Scotland as above, says that in this country the rule is in general otherwise, citing a number of cases in Note 3 to § 104.

It is to be noticed, however, that this author, after making the statement above given, throws the weight of his learning and research against what he says is the tendency of the American Courts, and in an instructive discussion of the question seems to demonstrate that the English rule is the correct one.

It is also worthy of remark that, in the note already referred to, he follows the citation of the cases which are said to make the American rule with the statement that, "as a matter of fact, it has been decided in a single instance only (*Western Union Telegraph Company v. Shotter*, 71 Ga., 760) that the receiver of an altered message is entitled to hold the sender responsible upon its terms," adding, "that the principle which would allow him to do so, however, has been considered in the other cases."

Let us see what may be briefly said of the other cases.

In *Wilson v. Minn. & Northwestern Railroad Co.*, 31 Minn., 481, it is apparent, from pages 482-3 of the opinion, that the question of agency was really not involved.

With *Rose v. U. S. T. Co.*, 3 Abb. Pr. Reps.

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U. S., 408, we content ourselves with what Mr. Gray says of this case. "It seems to affirm that the employer of a telegraph company is responsible upon a negligently altered message, but it does not necessarily determine the question.

The case decided that the plaintiff, who was the agent of the sender of a message, altered through the negligence of the defendant, could not maintain an action against the defendant for the injury sustained through acting upon that alteration.

"The decision was rested upon the ground that the plaintiff had sustained no injury through the act of the defendant, since he had a perfect remedy for his loss against the sender of the message. The ground of this decision is open, perhaps, to objection." See § 78.

Continuing, the author says, "Assuming its sufficiency, it may be urged that the case in reality decided only that the employer of a telegraph company is responsible upon a negligently altered message where the relationship of principal and agent exists between him and the receiver of that message—a decision which does not determine the question under consideration."

*Dunning v. Roberts*, 35 Barb., 463, is of little weight. The case decided simply that the defendant was responsible upon a message which was unquestionably correctly transmitted and delivered—although it was not the one that he wished sent—upon the ground of the relationship of principal and agent existing between himself and the actual

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sender of the message. The latter, moreover, in the absence of the operator of the company, telegraphed the message himself, so that no contract at all was made between the telegraph company and the defendant."

In *Saveland v. Green*, 40 Wis., 431, there was no question of a mistake in the dispatch; the only question was whether the telegram received, where no mistake was claimed, was to be treated as the original, so as to make it competent evidence of the contents of such telegram.

*Durkee v. Vermont Cent. R. R. Co.*, 29 Vt., 127, decides that the original, where the person to whom it is sent takes the risk of its transmission or is the employer of the telegraph company, is the message delivered to the operator, but where the person sending the message takes the initiative so that the telegraph company is to be considered as his agent, the original is the actual message delivered at the end of the line. In this case there was no question of mistake, nor of the sender being bound thereby, but merely a controversy as to what was original, and what was secondary evidence of the contents of a telegram.

Moreover, if this case decides anything pertinent to the case at bar, it is that as Bugg & Co. first invoked the services of the telegraph company, inviting a reply from complainants through the same medium, the company in such case was the agent of Bugg & Co., not of complainants, so that the

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latter would not have been bound by the negligence of the company.

*N. Y. & Wash. Pr. T. Co. v. Dryburg*, 35 Penn. St., 298, is a case where the receiver of an altered message, who had suffered injury thereby, was allowed to recover against the telegraph company as for a tort. If the telegraph company is the agent of the party who sent the telegram, then we are unable to see how the receiver actually suffered injury in this case, because if the sender of the telegram was bound to make good to the receiver the contract as reported in the altered message according to its terms, then the party addressed could have recovered of the sender the value of the two hundred bouquets called for in the altered message instead of two bouquets.

What is said in this case as to agency of the company so as to bind the sender is pure *dictum*.

*Howley v. Whipple*, 48 N. H., 487, the next case cited by Mr. Gray in the note referred to, so far as it touches the question now under consideration, is a mere *dictum*, and it would be uninformative in this connection to state what it really does decide. The character of the question before that Court may be inferred from a quotation which the opinion makes from § 340-1 of Scott & Jarnagin on Telegraphy, adding that "many cases are cited in the above work, from which it is held that in all controversies between the sender of the message and the company, the original message is the one left at the office by the party sending it. But where

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a man sends a proposition to another by telegram, and gets a reply accepting the offer, the original message, so far as binding the acceptor is concerned, is the one delivered to him at the other end."

So of *Barous v. Brown*, 25 Kan., 410; *Matteson v. Noyes*, 25 Ill., 591; *C. & St. L. R. R. Co. v. Mahoney*, 82 Ill., 73; *Williams v. Brickle*, 37 Miss., 682; *C. & I. R. R. Co. v. Russel*, 91 Ill., 298; *State v. Hopkins*, 50 Vt., 316. They relate alone to the question of original and secondary evidence, so far as they touch directly or indirectly upon the matter now under consideration.

*Morgan v. People*, 59 Ill., 58, was where the plaintiff in an execution telegraphed to the Sheriff to hold up the sale contemplated thereunder. The Sheriff refused to obey the telegram, and was sued for damages by the owners of the property. It was held that the telegram delivered to the Sheriff was the original, and that he should have obeyed it. There was no alteration or mistake in the telegram.

*Smith v. Easton*, 54 Md., 138, was this: Smith & Whitney, who were creditors of W. H. Easton, determined to attach his property to secure their debt. It was agreed, however, that he might telegraph to his brother, J. T. Easton, in New York, and that all parties would await the reply. W. H. telegraphed to J. T. as follows, "Smith & Whitney are here, and will attach if not secured." He received a reply saying, "Will endorse your



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Smith & Whitney note—three months.” Smith & Whitney took the note of W. H. Easton at three months in satisfaction of their claim, and sent it to J. T. Easton, in New York, for his endorsement, which was refused. Thereupon they sued him, and introduced the telegram that was received by W. H. Easton, upon which they had acted. The Court held that the telegram received was not evidence of a liability upon J. T. Easton, but that the message written by J. T. should have been introduced or accounted for.

This certainly decides nothing to support complainant's contention here. On the contrary, the logic of it would seem to be adverse to the idea of agency in the company, for if the company was the agent of the sender when it delivered the telegram, the telegram, as delivered, was the act of the principal, and ought to bind him.

We have devoted more time and space to these cases than might appear to be necessary, but as they are summed up in the note referred to by Mr. Gray as the cases that are regarded as making what is called the rule in America, it was deemed not out of place to ascertain what they were. We make and have no criticism upon what these cases do decide, we merely say that they are not authority upon which to predicate the claim that the courts in this country have established or settled the question under consideration. As already stated, Mr. Gray not only shows that upon principle the English holding is the correct

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one, but, while listing the cases above mentioned as indicating a contrary view, he states that most of them are *dicta*.

There is but one case referred to by him, and the industry and learning of counsel have produced no other, which directly adjudges that the sender of a telegram is bound to the receiver by the terms of the message as negligently altered by the Company. That is the case of *Western Union Telegraph Company v. Shotter*, 71 Ga., 760.

With very great respect for the high character of that learned tribunal, we cannot approve the line of reasoning pursued, nor the conclusion therein reached. The facts of the case present the question exactly in the shape, and under the same circumstances, which we have in the case at bar. The learned judge delivering the opinion places his conclusion in part on the fact that in England the government has charge of the telegraph lines, and upon the idea that a merchant, or business man, would lose credit and commercial standing were he to refuse to make good to his correspondent the contract contained in his message as delivered. We cannot see how the fact of governmental charge of the telegraph system can make any difference, for in this country the sender is as impotent to control and direct the movements and conduct of the telegraph company as if it were under the government, while in no sense can the company be said to be a bailee or carrier of the particular message.

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Nor can we see how the commercial standing of the sender, who remits his correspondent to his recourse on the telegraph company for such injury as may result from the erroneous message, can be effected.

The Georgia case, however, while holding that the sender was bound to let the receiver have the goods at the reduced price stated in the erroneous message, decides that the sender is not entitled to recover from the company as damages the difference between the price as written by the sender and that delivered by the company, upon the ground that there was no evidence that the purchasers, at the points where the telegrams were received, would have given the price at which the goods were offered in the correct telegrams, nor what was the market value of the goods at the place to which they had been shipped in consequence of the error, the Court holding that the measure of damages in such case was "the difference between the price offered by the error of the telegram and the market value at the point to which shipped—that is, what the seller could have gotten there."

This case, therefore, though holding as stated concerning the idea of agency, is opposed to the conclusion of the Chancellor in the case at bar on the measure of damages.

Being of opinion, then, that the complainants were not bound to let Bugg & Co. have the goods at the price erroneously communicated by the tele-

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graph company, but that it was their privilege to have reclaimed them when Bugg & Co. refused to pay the price as written by complainants, let us see what were their rights and duties, and what is the criterion of damage in such a case. They were bound to have taken just such steps as a reasonably prudent man would take to save himself had the mistake or error been his own.

A man, under such circumstances, is not to be held to have done the wisest and best thing, but to the exercise of reasonable skill and diligence. Whether he so acted or not is a question of fact to be left to the jury, under proper instructions by the Court, in a jury case, and for the Court to try as any other question of fact in Chancery or non-jury cases.

What would be prudent in one case might be very unwise in another, dependent on the character of the goods, the market value in the place to which sent by the mistake, or the value at the place from which sent, regard being had to storage, expense of selling, handling, freights, depreciation of perishable goods, and fluctuations in the market, etc.

For instance, in one case it might occasion less loss to sell at the price named in the message as erroneously delivered, where the cost and risk of storage and selling on that market would be heavier than the difference in the price as sent and the price as received, or the cost of returning the goods where the freight both ways might be more

than such difference. Where the difference in the price as sent and the price as erroneously delivered was greater than would be the cost of such retaining and selling there with freight one way, or greater than returning with freights both ways, regard being had to the markets at the two places, then he ought not to sell at price so named, but should retain or return, according to his best judgment.

In such cases the Courts will not be over nice, on behalf of the negligent company, in adjusting the scales to the wisdom of the several means open to the party injured, and undertake to weigh carefully the question as to what was best as then appeared, and certainly not as to what was best as seen in the light of subsequent events, but will merely require the victim of the negligence to act in good faith, in the exercise of ordinary prudence, in the effort to extricate himself from the situation in which he has been placed.

Where this has been done, the loss resulting will be the measure of damages which he will be entitled to recover, upon the doctrine of compensation.

It is manifest that it would be unreasonable to expect the same conduct in a case where the goods shipped in consequence of the negligence of the company were lumber, coal, or the like, where freights would be a large factor in the loss, and in a case where the goods were bonds, diamonds, and the like, where freights are insignificant compared with value; such considerations, together with

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the facilities for sale, proximity to other markets, and the like, are to be regarded in connection with the facts and circumstances of each particular case.

This is a summary of the result of general principles, all of which are too well settled to require citation of authority.

Applying these principles to the case at bar, we find no proof in the record that would enable us to ascertain the damages fairly resulting from the negligence of the telegraph company. There is nothing to show what was the market value of the meat at Birmingham, nor at Memphis, unless the telegram, as written by the senders, is to be considered as fixing it. This is evidence of what the sender was willing to take for it, and in the absence of proof to the contrary, may be said to furnish evidence of the market value in favor of the party making the offer as against third parties. There is no proof as to freight either way, so that we cannot say whether the complainants have acted prudently in selling at the price named in the erroneous telegram, or whether he should have sought other purchasers at Birmingham, or recalled the meat to Memphis, or taken some other course. In the absence of some such proof it is impossible for the Court to ascertain the extent of the injury inflicted by the company's negligence, so as to fix and determine the compensation therefor with certainty.

But the negligence being established, and the complainants having shown that they disposed of

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the goods at the price named in the erroneously delivered message, which was one of the means open to the shipper of extricating himself with the smallest loss, and there being no proof whatever tending to show that such disposition of the goods was not the very best thing to be done under the circumstances, we are of opinion that the difference between the price named in the telegram as sent and as delivered, where sale is actually made at the latter price, may be taken as the correct measure of damages where, as in the case at bar, the difference is not so great as to excite suspicion, and where, from the character of the goods, it does not appear unreasonable and improper to make such disposition of the goods. Where the conduct of the party injured, in his effort to extricate himself from loss, does not appear to have been improvident, nor in bad faith, and the loss is shown from such conduct, the burden of proof is upon the author of the wrong to show that the loss might have been mitigated by a different course of conduct, which a reasonably prudent man ought to have taken. In the absence of such proof the loss, as shown, will be taken as the correct measure of damages in the particular case. Of this the wrongdoer certainly cannot complain, the fault being his that there is not proof that some other course of conduct would have lessened the damages.

Let the decree be affirmed with costs.

## ERCK v. CHURCH.

(Jackson. May 7, 1889.)

\*1. LIMITATION. *Possession by mistake.*

If a purchaser of land inclose a parcel contiguous to his purchase, by mistake, believing that he is putting his fence on the true boundary, and hold such parcel as his own for seven years, such possession is adverse, and will avail against the true owner.

Case cited and distinguished: *Gates v. Butler*, 3 Hum., 447.

Cited and approved: *Pearce v. French*, 8 Conn., 439.

2. SAME. *Connecting possessions.*

Where such possessor is succeeded in possession by another, and there is no privity of estate between the two, such as exists between ancestor and heir, or deviser and devisee, and none is created by contract, parol or written, having for its object the transfer of the possessory right, the possessions of the two cannot be connected so as to make out the period of limitation.

Cases cited and approved: *Marr v. Gilliam*, 1 Cold., 491; *Graeven v. Devies*, 31 N. W. R., 914; *Fanning v. Willcox*, 3 Day (Conn.), 258.

Cited and commented upon: 11 Hum., 464; 1 Swan, 502; 5 Sneed, 396; Same, 637; 6 Bax., 47; 4 Lea, 701; 10 Hum., 212; 73 Ill., 439.

3. SAME. *Case in judgment.*

W purchased a lot, and by mistake inclosed land that his deed did not convey, believing that he was putting his fence on the true line, and held the land thus inclosed as his own less than seven years. W sold to C the land he had purchased, following the description in his own deed, and C went into possession of the whole, and held it as his own long enough to make out the period of limitation by tacking his possession to that of W. W did not in any way undertake to transfer to C his possessory right to the parcel so held. Both were ignorant of the mistake in boundaries.

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\* Syllabus prepared by Judge Dickinson.—REPORTER.



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*Held*, That the possession of each was adverse to the true owner, but that the two possessions could not be connected to make out the period of limitation.

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FROM SHELBY.

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Appeal from Chancery Court of Shelby County.  
B. M. ESTES, Ch.

Ejectment bill. Decree for complainant. Defendant appealed.

J. M. GREGORY for Complainant.

GANTT & PATTERSON for Defendant.

\*J. M. DICKINSON, Sp. J. Complainant filed this bill September 25, 1886, to recover possession of a parcel of land in Memphis, fronting three feet and ten inches on Lauderdale Street, and five feet seven and one-half inches on Humphries Street, being three hundred and nine feet in length.

It is admitted that complainant has a good legal title, and that he has a right to recover, unless it has been defeated by the operation of the statute of limitations.

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\* Judge J. M. Dickinson, of Nashville, was appointed by the Governor April 9th, 1889, and served until close of term, in place of Chief Justice Turney, who was absent on account of sickness.—REPORTER.

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Mackall sold and deeded to Warner a lot contiguous to the parcel in dispute, fronting fifty feet on Lauderdale Street, and the same width on Humphries Street, bounded by parallel lines. In taking possession Warner did not measure his fifty feet. Mackall, at the time Warner purchased, pointed to a group of trees, and designated one as being on the south boundary line of the lot sold. Warner fenced in his purchase, and placed his south fence along the line indicated, believing that he was inclosing the parcel purchased of Mackall and no more. He, in fact, inclosed with his fifty foot lot the parcel in dispute, and from that time continued to hold as his own the entire tract included by his fences.

Warner sold to defendant Church by deed, following the description in the deed from Mackall to him, which embraced the fifty feet, but not the parcel in dispute, and Church took possession of the whole tract as inclosed by Warner, and held it as his own.

It is admitted that Church has not held seven years, but that Warner and Church together have held more than seven years. Complainant contends that the statute of limitations has not operated for these reasons:

*First.* That Warner did not intend to inclose any ground but the fifty feet he purchased; that he took possession of and held the disputed parcel by mistake, and that, therefore, the statute was not set in motion because an essential requisite, namely, an intention to hold adversely, did not exist.

*Second.* That the periods of possession by Warner and Church cannot be connected, because they are both wrong-doers, and there is no privity between them.

On the first question we are without precedent in this State.

The case of *Gates v. Butler*, 3 Hum., 447, is erroneously cited by complainant as sustaining his contention. In that case plaintiff asserted title by constructive possession of a large tract, a portion of which he claimed to have held adversely for seven years by actual possession. This possession, if it existed, came by inclosing a small portion of the land in the disputed grant by mistake in placing the fence on the supposed boundary line of a contiguous tract, held by a different title. The proof made it most probable that the fence was on the true boundary line. The Court said: "Under these circumstances the Court charged that the accidental and unintended inclosure of a small part of the land for seven years would not vest a valid title, etc. In this we think there was no error, and we affirm the judgment."

There is a wide difference between a plaintiff actively setting up a title, claimed to be perfected by accidental possession of a portion of land embraced in an instrument giving a color of title, and one defending by a possessory right to the extent of his actual inclosures.

A Court would be slow to assist one who, though having a color of title to a tract of land, by mis-

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take, and without intention to assert his title, had inclosed an insignificant portion of the tract, and afterward, on discovering his accidental holding, sought to extend, by construction, this possession, so as to invest himself with an indefeasible title to the whole, and thus convert the possession, which might be a shield for defense commensurate with his actual occupancy, into a weapon of attack as far reaching as the limits embraced in his deed. The case of *Gates v. Butler* decided that such possession could not avail for such a purpose and nothing more.

The Courts of the different States are in conflict upon the question we are considering. In Wood on Limitation of Actions the opposing rules are stated, and the cases sustaining them respectively are cited. Sec. 263.

In *Pearce v. French*, 8 Conn., 439, the defendant occupied lands not embraced in his deed, under the mistaken idea that they were included in his deed. There was no evidence that he intended to occupy such lands adversely, except such as might be afforded by the fact that he occupied and used them as his own. The Court held that he thereby acquired title to the land by possession.

Under the second section of the Act of 1819, "no person, or any one claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued."

If one enter upon the land of another, whether

with intent to disseize, or mistaking it for his own, a right of action accrues at once to the owner. If the one so entering holds and claims the land as his own for seven years continuously, then certainly the conditions of the statute will have been fulfilled. The right of action of the true owner accrues at once upon the entry, and is not dependent upon the state of mind or the knowledge as to boundary lines possessed by the one entering. If the fact of knowledge or intent were an essential element of disseizin, then the real owner would have no right of action against one who had entered by mistake, until after he was convinced of his mistake, and then, with knowledge of his error, continued to hold, thus altering the character of his possession, and technically ousting the true owner, by a change of mental condition.

Such a contention, under our statute, is not tenable. The right of action accrues when one takes possession as his own, whether by mistake or otherwise, and the right of recovery is barred in seven years from such entry if the possession be unbroken.

The possession and adverse holding are notice to the world, and to the true owner, to the extent of the occupancy, and the visible physical fact should not be overcome by mere refinements based upon mental status. To hold otherwise would be to place the intentional wrong-doer in a better position than one who had innocently entered upon the lands of another, and expended his means in good faith. The intentional land-grabber who, with

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premeditated wrong, took possession of lands, would be protected, while one who, by error of surveyor or as to natural monuments, innocently and by mistake entered on the wrong land and improved it in good faith, would not be protected, if he held twice seven years. A mistake of a surveyor in locating a city lot for valuable improvements might cause one to place a wall a few inches beyond the actual line called for by his deed, and no length of possession short of the time required for a presumption of a grant would quiet the possessory right.

It is manifest, from the proof in this cause, that Warner and Church intended to hold all the ground embraced by their fences as their own. Such possession was adverse under our statute, whether it was by mistake as to the real boundaries or not, and if continued for seven years it would bar an action for recovery of the land so held.

✓ The next question for consideration is, whether, upon the facts in this case, the bar was complete. It is admitted that Church has not held for seven years, and that to make out his defense he must tack his possession to that of Warner

The deed from Warner to Church does not convey the land in controversy. There is no evidence that Warner, by deed or otherwise, undertook to transfer to Church his possessory right to this ground. There is no connection between them in respect to it, except the fact that Church took

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possession of it, along with the fifty feet deeded to him by Warner.

Can the two possessions be connected so as to make out the seven years? The declaration, that the successive possessions of trespassers cannot be united for the reason that there can be no privity between wrong-doers, has appeared from time to time in our reports. In *Moffitt v. McDonald*, a case of holding slaves, the period of adverse possession being fully made out without connecting different possessions, Judge Green (11 Hum., 464) says, "It is a well-settled principle, alike applicable to real and personal property, that between successive wrong-doers, having no title, there can be no privity, and therefore their possessions cannot be united so as to make out the time required to form the bar of the statute of limitations." The proposition stated was not involved in the case.

*Wells v. Ragland*, 1 Swan., 502, and *Hobbs v. Ballard*, 5 Sneed., 396, were both cases of adverse holding of slaves, and curiously enough, in each, not the defendant, but the complainants sought to connect the several possessions, so as to avoid the effect of the statute of limitations, inasmuch as all of the complainants were minors during the first possession, and, under the rule in our State, the bar would not have become complete until all of them had reached majority, whereas, when the second possession began, one was of age, thus barring all unless suits were brought within the time fixed by the statute for the one who was

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free from disability. Though the successive possessions were connected by sale and transfer, the complainants sought in vain to tack them and make them one, the court holding that each new possession was a conversion, and that there could be no privity between wrong-doers.

In *Clark v. Chase*, 5 Sneed, 637, the doctrine before stated is broadly asserted, but it was not called for by the case. Judge Caruthers says, "The complainants' counsel contend that the case is analogous to successive possessions of naked trespassers or wrong-doers, which it has been often held by this Court cannot be united in order to make out the time required by the statute of limitations for the bar under the Act of 1819." He, however, cites no cases adjudicating this question.

In *Baker v. Hale*, 6 Baxt., 47, the Court expressly held that the successive possessors were not trespassers, the first having gone in by parol contract to purchase and having transferred by deed his right to the second. Judge Nicholson, however, in his opinion, says: "It is settled by repeated adjudications that the successive possessions of trespassers cannot be so connected as to make up the bar of seven years under the second section of the Act of 1819, and for the reason that there can be no privity between wrong-doers," citing three of the cases above commented on, and *Vance v. Fisher*, 10 Hum., 213.

In *Nelson v. Trigg*, 4 Lea, 701, although the



facts and the decision of the case did not call for it, the principle is stated as follows :

“A naked trespasser, without color of title, cannot transmit his right to a successor so as to enable the latter to couple the two possessions to make out the bar of seven years.” This doctrine, so often reiterated as an established and familiar principle of our land law, is not directly adjudicated by any case in our State which has been called to our attention.

In *Vance v. Fisher*, 10 Hum., 212, the defendant undertook to connect his possession with that of a prior possessor, which the Court denied him, on the ground that he had received the possession from the administrator of the first possessor, and that the administrator having no control over his decedent's land, had no right to transmit the possession so as to connect the two, and that for this reason the defendant “must be regarded as being in possession of the land not in privity with the previous possessor, but as a wrong-doer who cannot couple his possession with that of a prior possessor.” It would seem inferentially that the conclusion would have been different had the possession been passed by the first possessor himself. This, however, would not have been a precedent for the case under consideration, inasmuch as the first possessor in the 10 Hum. case had entered under a contract by which one Orr had sold him the land with covenant to convey, which constituted a color of title.

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A leading case in this State, and one frequently cited by judges and text-writers, is *Marr v. Gilliam*, 1 Cold., 491. The point, actually decided, was that the possession of one who had entered lawfully upon land by deed as a tenant in common, but who subsequently began to hold adversely to the other tenants in common, might be connected with that of his heirs so as to make out the period of the statute, because there is a privity of estate between ancestor and heir, but that the wife of such first possessor could not connect her possession with his because there was no such privity between husband and wife. Judge Wright (page 504) thus states the law, "Separate successive disseizins do not aid one another, where several persons successively enter on land as disseizors, without any conveyance from one to another, or any privity of estate between them, other than that derived from the mere possession of the estate. Their several consecutive possessions cannot be tacked, so as to make a continuity of disseizins of sufficient length of time to bar the true owners of their right of entry."

On pages 509-10 Judge Wright discusses the cases of *Wallace v. Hannum*, 1 Hum., 443; *Norris v. Ellis*, 7 Hum., 463; and *Crutinger v. Catron*, 10 Hum., 24, and criticises as *dicta* the statements in those opinions, that a trespasser by mere possession, without color of titles, acquires no right that is either alienable or descendible. As previously stated, Judge Nicholson, in *Baker v. Hale*,

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6 Baxt., 48, says: "It is settled by repeated adjudications in this State that the successive possessions of trespassers cannot be so connected as to make up the bar of seven years under the second section of the Act of 1819, and for the reason that there can be no privity between wrongdoers." In this case he reviews *Marr v. Gilliam*. On page 51 he apparently approves the statement of the law as made by Judge Wright, to the effect that successive possessions of trespassers may be tacked together where the successive possessors hold the land as their own, and there is a privity of estate between them. On the next page, however, he says that the possessory right of a naked trespasser is not descendible or alienable. This is clearly in conflict with the position of Judge Wright. In neither case, however, was the law, as stated, called for. Thus we have conflicting declarations of the law from eminent judges, but none of them are stamped with the authority of an adjudged case.

In Wait's Action and Defences the following is stated to be the law: "When there are several successive adverse occupants of real property, the last one may tack the possession of his predecessor to his so as to make a continuous adverse possession for the time required by the statute, provided there is a privity of possession between such occupants; and in case of an actual adverse possession, such privity arises from a parol bargain and sale of the possession of the premises followed

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by delivery thereof, as well as by a formal conveyance from one occupant to the other." Vol. 6, page 455, and the cases there cited.

In *Weber v. Anderson*, 73 Ill., 439, the facts presented a case involving almost every essential element embodied in the case under consideration. The instruction in the lower court to the jury was that the rights acquired by the first possessor could not be transmitted except by deed. The case was reversed, the superior court saying that there was "parol proof" showing the Plank Road Company transferred "their possessions over to him" (the defendant). It was held that parol proof was sufficient to show the transfer of possession, and that it could be tacked to the subsequent holding. It does not clearly appear in that case whether or not there was an actual transfer of a possessory right by parol. The language of the Court would admit of this construction. If, however, the possession merely passed as in the case under consideration, *sub silentio*, without any knowledge by either party that there was such a possessory right, and that it was being transferred, then the case is an extreme one.

The opposite conclusion was reached under a similar state of facts by the Supreme Court of Wisconsin in *Graeven v. Devies*, 31 N. W. R., 914.

In *Fanning v. Willcox*, 3 Day (Conn.), 258, the rule (as quoted by Wood on Limitations, page 582, note) is thus stated: "Doubtless the possessions must be connected and continuous, so that the possession of the true owner shall not constructively

intervene between them; but such continuity and connection may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact."

This is in substantial accord with the doctrine as stated by Judge Wright in *Marr v. Gilliam*, which is approved by us. There must be a privity of estate connecting the successive possessions, and a transfer of the possessory right, by grant, inheritance, devise, or contract, verbal or written. The mere fact of successive possessions appearing, and nothing more, will not constitute such privity. If the contrary rule were adopted, then any independent trespasser entering upon land simultaneously with the abandonment of it by a prior trespasser could connect the two possessions, without any pretence of a privity of estate, by merely showing that there had been no actual *hiatus* between the possessions.

The deed to Church does not embrace the land in dispute, and there is no evidence that Warner undertook to transfer to Church his possessory right to it. On the contrary, it is shown that he was ignorant of having such right. There is no privity of estate between them in respect to this land. Warner both acquired and abandoned his possessory right in ignorance of its existence. The entry by Church was a new disseizin, and a new period of limitation began.

The decree of the Chancellor is affirmed.

## LAND COMPANY v. HILL AND OTHERS.

(Jackson. May 7, 1889.)

\* 1. WILL. *Remainder to children as a class.*

A devise to a daughter for life, with remainder to her children, the survivors or survivor of them living at her death, vests the estate in remainder in the children living at the death of the testator, *as a class*, and such estate will open and let in after-born children, and will be defeated as to any child or children dying in the life-time of the mother.

Cases cited: *Satterfield v. Mays*, 11 Hum., 57; *Bridgewater v. Gordon*, 2 Sneed, 5; *McClung v. McMullen*, 1 Heis., 655, 660.

2. SAME. *Same. Deed of one of the children.*

In such case, the children living at testator's death do not take as tenants in common, during the life-time of the mother, but only as members of a fluctuating class, with no specific or fixed interests, and a conveyance by one of them to a third party by deed with covenants of seizin and general warranty, of the whole of a tract of land so devised, does not impose upon the vendee, toward the other children, the duties and obligations of one tenant in common to another.

3. RESCISSION. *Executed contract. Fraud. Insolvency.*

A purchaser, after deed made and possession taken under it, in the absence of fraud, is not entitled to rescission, or to resist payment of the purchase money so long as he remains in possession, unless the seller is insolvent.

Authorities cited: 1 Sugden on Vendors, 251, 8 Am. Ed.; *Abbott v. Allen*, 2 Johns. Ch. R., 519; 12 Heis., 175; 5 Sneed, 505; 1 Head, 640.

4. FRAUD. *In obtaining sale under trust deed, what is not.*

That a party desirous of acquiring land incumbered by a trust deed made by a testatrix in her life-time for the security of debt, procures the trustee or a creditor to foreclose, and buys at the sale made openly and fairly upon public advertisement and competitive bidding, in strict accordance with the terms of the trust, is no evidence of fraud against the devisee, where such purchaser is ignorant of the

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existence and terms of the will, and believes the land had descended to the sole heir at law, whose vendee proposes to convey to him upon such sale being made by the trustee, and where the sole object in procuring the foreclosure is the exhaustion of the creditor's remedies against the land, although the vendee of the heir had assumed the payment of the incumbrance.

5. SAME. *Notice of existence and terms of will, what.*

The notice of the existence and terms of a will, implied by a charge of fraud in concealing them, is *actual*, and not merely *constructive* notice.

6. CONSTRUCTIVE NOTICE. *Extends to whom.*

Constructive notice of a will, arising from the fact that it is a public record, extends only to persons acquiring rights or titles which are in some way resting on, or subordinate to, or affected by, the will, and does not extend to those acquiring rights or titles wholly independent of and superior to the will.

7. SAME. *Deeds and instruments referred to in title papers, how far constructive notice.*

The general rule that a party is held to have constructive notice of what appears in the deeds and instruments referred to in the title papers constituting his chain of title, does not, in principle, apply to collateral and immaterial deeds or instruments incidentally referred to, not as relating in any way to the title or land conveyed, but only to the *consideration*.

Cited: Bigelow on Estoppels, 341, *et seq.*; 2 Devlin on Deeds, §§ 1000, 1006.

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FROM SHELBY.

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Appeal from Chancery Court of Shelby County.  
B. M. ESTES, Ch.

W. M. RANDOLPH for Complainant.

HILL & WILKERSON, CRAFT & CRAFT, and METCALF  
& WALKER for Respondents.

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Land Company v. Hill and Others.

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\*JOHN A. PITTS, Sp. J. On the 25th of June, 1887, Napoleon Hill sold and conveyed by deed with covenants of seizin, general warranty, and against incumbrances, to the Kansas City Land Company, a tract of land in Shelby County of sixty-six and thirty-seven one-hundreths acres, for the consideration of \$149,332.50, of which the sum of \$56,000 was paid in cash, and the balance secured by two notes for \$46,666.25 each, bearing interest, and due at one and two years. A lien was retained in the deed, and the Land Company was placed in possession.

On the 22d of June, 1888, a few days before the maturity of the first note, the Land Company filed the original bill in this cause against Hill, its vendor, Mrs. Elizabeth M. Hays (named in the bill as Lizzie W. Hays), and her three sons, Samuel J., James W., and John M. Hays, suggesting that the title to forty-four of the sixty-six and thirty-seven one-hundreths acres conveyed to it by Hill was doubtful, and probably defective; that, if so, Hill had fraudulently represented that his title was good to the whole of the property conveyed, and that without the forty-four acres, which were claimed by the other defendants, the purchase was not desirable; and praying in the alternative, first, that its title under Hill's conveyance be declared perfect and indefeasible, and the claims of the other defendants adjudged to be clouds thereon

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\*Sitting for Judge Folkes, who was incompetent.



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and removed; and, secondly, if this could not be done, that its purchase from Hill be rescinded, its notes delivered up and canceled, and that it have a decree against Hill for the purchase money paid, with interest.

The primary relief sought by this bill is the quieting and confirmation of the complainant's title, and its effort throughout is, manifestly, to show that its title is good, notwithstanding the facts suggested as casting a doubt upon it.

The bill was dismissed as to James W. and John M. Hays, upon their demurrer, on grounds which need not be now considered. Samuel J. Hays filed a separate answer, which he prayed might be taken also as a cross-bill, claiming an interest in the forty-four acres under the will of his grandmother, Mary A. Walker. No defense seems to have been made by Mrs. Elizabeth M. Hays.

Hill also answered and denied all fraud, and that the title was doubtful or defective, and subsequently filed a cross-bill to enforce his lien for purchase money. The complainant Land Company, in its answer to this cross-bill, reversing the theory maintained by it in its original bill, vigorously assaults the title of Hill, and sets out with great minuteness and detail the facts on which it strenuously insists the title is bad, and asks unconditionally to be relieved of its purchase. It traverses some of the statements of its original bill, and, feeling doubtless the force of this incon-

sistency in its pleadings, states, by way of explanation in the answer, that such inconsistency arose from the insufficiency and falsity of the information upon which the contrary allegations in the bill were predicated, and that it has since ascertained the truth as set forth in the answer.

This feature of the case has been adverted to by counsel for defendants, and may be disposed of at once.

Upon inspection of the two pleadings it is apparent that the repugnancy between them is more of theory than of fact, and arises either upon statements made *on information* or upon statements of complainant's *conclusions*, and hence does not work any estoppel against the truth.

The Chancellor, upon a hearing on the merits, held the title good, denied relief to the complainant Land Company and defendant Samuel J. Hays, and gave defendant Hill a decree on his cross-bill enforcing his lien for purchase money. From this decree, as well as the previous decree sustaining the demurrer of James W. and John M. Hays, the Land Company appeals, and alone assigns error.

The land in controversy originally belonged to Mrs. Mary A. Walker, and it is conceded that the title must be derived from her. This defendant Hill undertakes to do in two ways, and through two distinct and separate chains—the one beginning with a deed of trust made by Mrs. Walker in her life-time, and the other with her will. It was

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upon the first of these two chains of title—that beginning with the deed of trust—that the Chancellor based his decree, and if his view of the case is correct, it is conclusive, however defective the other chain may be. This aspect of the case will therefore be considered first.

The deed of trust was executed on the 11th day of July, 1872, by Mary A. Walker, defendant Elizabeth M. Hays (therein named as Lizzie W. Hays) and her husband, A. J. Hays, to C. B. Wellford, as trustee, to secure eleven promissory notes of the same date, made by the makers of the deed, and payable to the Life Association of America, one for \$5,000, due five years after date, and ten for \$250 each for interest, due respectively at the end of each semi-annual period from date, all of the notes being given to secure a loan of \$5,000 with ten *per cent.* interest, payable semi-annually. It provided that upon default in the payment of any of the notes at maturity, the right of immediate foreclosure should accrue, and the whole debt, for the purpose of foreclosure, become due at once. A similar result was to follow, by the terms of the deed, upon a failure to pay taxes promptly as they accrued. It was properly acknowledged and registered, and no question is made against its validity. It is shown that the debt secured by it was the debt of Mrs. Walker, incurred for improvements on the property now in controversy which then belonged to her. No reason is shown for the joining of Mrs. Hays

and her husband in this deed, unless it be the fact that Mrs. Walker had previously made her will devising the property to Mrs. Hays for life, though this does not appear from the face of the deed.

On the 28th of July, 1877, after the death of Mrs. Walker, Wellford, the trustee, sold the property, in pursuance of the terms of the deed, to Napoleon Hill and W. F. Taylor for \$6,005, which they paid in cash, being about \$100 in excess of the debt then due and expenses of sale; and on the 30th of the same month the trustee conveyed to them by deed with proper recitals. Taylor subsequently sold and conveyed his interest to Hill. These conveyances are all regular, and exhibit a good and indefeasible title on their face. This is not controverted.

But it is insisted, on behalf of the opponents of Hill, that the sale and conveyance by Wellford, the trustee, were procured by the fraud and collusion of Hill and Taylor, and one Chas. Hewett, with a view to cutting off the devisees of Mrs. Mary A. Walker, and that such conveyance is therefore ineffectual as against such devisees, and is liable to be impeached by them and declared void at any time.

This contention is specially important on account not only of the magnitude of the interests involved, but also of the provisions of the will of Mary A. Walker, by which the property in controversy was given to her daughter, Elizabeth M. Hays, for life,

with remainder in fee to her children living at her death. Children of Mrs. Hays not yet born, should such survive her, will take an interest in the property under the will, in conjunction with such of her present children as shall also survive her; and in the event future-born children only shall survive her, they will take the whole property, the devise being to the children of Mrs. Hays, the survivors or survivor of them at her death, as a class. *Satterfield v. Mays*, 11 Hum., 57; *McClung v. McMullen*, 1 Heis., 655, 660; *Bridgewater v. Gordon*, 2 Sneed, 5.

It is possible, therefore, that the persons who will ultimately take the remainder under this will, and who are to be affected by the alleged fraud against the remaindermen, are not now in existence. If, then, the title is subject to the alleged infirmity, it is of the greatest importance to complainant that the fact be ascertained at once, and timely relief afforded, as otherwise, upon the future total or partial failure of the title by reason of such infirmity, in the possible contingency stated, its remedy upon the covenants of the deed under which it holds might be wholly inadequate.

The present children of Mrs. Hays, with herself, have all conveyed the property in controversy to Hill, since the commencement of this suit, warranting against all persons claiming under or through them; or, to speak more accurately, they have executed and acknowledged such a conveyance, and offer to deliver it upon the payment to them by

Hill of a sum named, and he on his part agrees to comply and accept the deed on condition that the complainant Land Company now has, under its deed from him, a good title, or will have by virtue of the proffered conveyance by the Hayses, and a proper transfer thereof by him to complainant. So that, so far as the present children of Mrs. Hays, or Mrs. Hays herself in any possible event, are concerned, the decision of the question stated is not necessary in the present aspect of the case, inasmuch as their proffered deed would as fully divest them of all title as could be done by the decree of the court. But in the possible contingency that a child or children of Mrs. Hays may be born hereafter and survive her, the interest which such child or children will take under the will must necessarily defeat the title of complainant to that extent, if it be true that the deed of Wellford, the trustee, can be successfully impeached; and in view of this contingency it is necessary to examine the question.

The alleged fraud and collusion in procuring the trust sale and conveyance, it is obvious, were not wrongs against the complainant Land Company, nor any one under whom it claims. But it is insisted that Hill, having participated in such fraud, and with knowledge of the existence and terms of the will, *concealed* these facts from complainant in his sale to it, and falsely represented that his title was good.

The complainant having accepted a deed from

Hill, and taken possession under it, and being still in possession, the bill would probably have been demurrable as a bill to rescind, without these allegations of fraud, as there is no allegation of Hill's insolvency; for the general rule undoubtedly is that a purchaser after deed made, in the absence of fraud, concealment, or misrepresentation, has no remedy except upon the covenants in the deed, unless the seller is insolvent. 1 *Sudg. Vend.*, p. 251, (8 Am. Ed.); *Abbott v. Allen*, 2 Johns. Ch. R., p. 519; 12 Heis., 175; 5 Sneed, 505; 1 Head, 640.

The question of fraud out of the way, the complainant is not entitled to a rescission so long as it remains in the undisturbed possession of the property conveyed. If the title is bad, either totally or partially, the covenant of seizin was broken as soon as made, and a right of action accrued upon that covenant immediately. If there was a failure of title to the whole of the property conveyed, the measure of damages upon the covenant of seizin would be the price paid, and a recovery would operate practically as a rescission, for a purchaser cannot be permitted to recover back the consideration and also retain the property conveyed.

Upon the pleadings here, however, the case is for rescission, if for any relief at all, and the vital question therefore is, have the charges of fraud been sustained?

From what has been said it is obvious that the alleged fraud on the part of Hill relates to two

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distinct subjects, namely, first, the sale and conveyance by the trustee Wellford, which, it is insisted, Hill procured to be made with the view and for the purpose of cutting off the devisees of Mrs. Walker, and which necessarily implies that he had actual knowledge of the existence and terms of Mrs. Walker's will; and, secondly, the sale made by Hill to the complainant Land Company, in which it is insisted he concealed his knowledge of the existence and contents of the will, his agency in procuring the sale made by Wellford, and fraudulently represented that his title was good and indefeasible.

The contention of Hill, on the contrary, is that he had no knowledge or information of the existence or contents of the will until long after his sale to complainant; that he had no agency whatever in procuring the sale by Wellford, and that he made no false statement or representation in his sale to the complainant; and he so testifies, positively and unequivocally, in his deposition.

It appears that on the 6th day of March, 1877, after the death of the testatrix, Mary A. Walker, Mrs. Elizabeth M. Hays (who was her only surviving child and heir at law), and her husband, A. J. Hays, and son, Samuel J. Hays, conveyed the forty-four acres in controversy to one Charles Hewett, of St. Louis, Missouri, with covenants of seizin, general warranty, and against all incumbrances except the deed of trust to Wellford, which was recited as an existing incumbrance on the land,



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together with some past due taxes—which incumbrances, it was also recited, Hewett was to discharge as a part of the consideration. At that time the interest note, due January 11, 1877, was past due, and unpaid; and one other interest note, and the note for the principal, had not matured. Hewett, not having the means with which to pay the past due note, procured Sterling & Webster, a business firm at St. Louis, to take it up from the Life Association of America, whose principal office was also at St. Louis, which they did on April 11, 1877, agreeing to hold the note a reasonable time for Hewett's accommodation, with the deed of trust as security.

It is argued by counsel for complainant that this transaction was a payment and discharge of the note as a debt against the land under the deed of trust, and that it thereafter became only a personal debt of Hewett to Sterling & Webster; and hence, there not being sufficient time for advertising between the maturing of the next notes, July 11, and the date of the sale, that the sale was premature and void.

The proof is clearly to the contrary. The transaction amounted to a purchase of the debt by Sterling & Webster, under an express agreement that they should have the benefit of the deed of trust for its security. They took up and held the note itself, and took no note from nor made any charge against Hewett. It was a subsisting part of the trust debt at the date of the sale, past due since January previous.

This note not being paid by Hewett, Wellford, the trustee, at the instance of Sterling & Webster, who paid the costs of advertising, amounting to twenty-two dollars, advertised and sold the property, as before stated, and out of the proceeds discharged all the notes and expenses of sale.

In the meantime, the precise date not appearing, Hewett entered upon negotiations with W. F. Taylor and defendant Hill for the sale of the property to them, Taylor conducting the negotiations on the part of himself and Hill. The terms of sale were agreed on, and a deed was prepared on July 2, 1877. But before closing the purchase Hill and Taylor procured an abstract of the title and submitted it to counsel for examination. The title was rejected on account of the existence, unsatisfied, of the deed of trust to Wellford, and thereupon the negotiations for the sale were suspended, or abandoned.

There is no fact or circumstance shown which indicates that either Hill or Taylor, at that time, or at the date of the trustee's sale, on the 28th of July, knew that Mrs. Walker had left a will. On the contrary, it appears that they knew, or had been informed, that Mrs. Hays was the only child and heir at law of Mrs. Walker, and they supposed that the title had descended to her as heir, subject to the deed of trust; and it was upon this assumption that the investigation of the title proceeded. Taylor likewise testifies positively that he had no knowledge or information of a will

having been made, and that he had no agency in procuring the sale made by the trustee, and no knowledge of it until he saw it advertised in the papers.

A deed, however, is produced from Hewett to Hill and Taylor, dated July 2, 1877, for this same property, containing covenants of seizin, warranty, and against incumbrances, and reciting a consideration of eight dollars paid; and it is shown by proof that they paid to Hewett or his agent, after the trustee's sale, the sum of one thousand dollars on account of the land; and it is argued that these facts show that the sale by the trustee on July 28th was made in pursuance of a previous collusive and fraudulent understanding and agreement between Hewett and Hill and Taylor, notwithstanding the testimony above cited to the contrary.


Although the deed bears date July 2d, which was before the sale, it is clearly shown that it was not delivered nor acknowledged until the first day of August thereafter, and the one thousand dollars paid Hewett, or his agent, was paid on the delivery of this deed. It was doubtless the same deed that was drawn and dated at the time the parties first agreed on the terms of sale, before the title was investigated, and was afterward delivered without changing its date. It obviously did not take effect until it was delivered, which was after the sale and conveyance by the trustee. But even with this explanation it is impossible to reconcile these facts with the non-agency and indifference of

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Hill and Taylor as to the trustee's sale, and with their contention that their contemplated purchase from Hewett had been abandoned; or to avoid the conclusion that the sale was made in pursuance of a previous understanding between them and Hewett, as a thing to be done before their contemplated trade should be consummated. Why should they pay to Hewett one thousand dollars after they had purchased and taken deed from the trustee investing them with the full title, freed from the incumbrance, if they did not consider themselves under some legal or moral obligation to do so? What interest had Hewett, then, which could pass by his deed? The trust deed provided that the sale should be free from the right of redemption, and the sale had been so made. Hewett, occupying the shoes of the makers of the trust, therefore did not have the right of redemption, nor does it otherwise appear that he had any interest whatever after the sale, except in the surplus of the proceeds, and his deed was evidently not intended to pass that. Another circumstance which confirms the conclusion that Hill and Taylor must have had an agreement and understanding with Hewett before the sale that the sale should be made, and that they would eventually purchase the forty-four acres, is the fact that while Hill, in his deposition, says that he and Taylor would not have purchased the other land embraced in his sale to complainant, and not now in controversy, *without the forty-four acres*, and claims that they did not make such purchase until



after their purchase of the forty-four acres at the trustee's sale, yet their deed for the *other* land is dated July 5, 1877, *before* the trustee's sale, and it is not shown that this was not the correct date of the purchase.

Hill does not give any reason for taking Hewett's deed and paying the one thousand dollars, the transaction having been conducted by Taylor. Taylor, in his deposition, when asked why Hewett was paid this money, says, "I expect, to carry out the original trade."

Hewett, in answer to the question why his deed to Hill and Taylor was not delivered until the 1st day of August, says: "Mr. Hill, to the best of my recollection, refused to take a deed until after the sale of the land in dispute under Mrs. Mary A. Walker's trust deed. On the 1st day of August, when the deed was delivered, I got a check through W. I. Berlin for a thousand dollars from Hill and Taylor, paid through Hill, Fontaine & Co., of Memphis, Tenn., *the amount due as purchase money.*"

The true state of facts on this question, established by the proof and circumstances, must be taken to be, that upon discovering the unsatisfied trust deed, Hill and Taylor refused to complete their purchase from Hewett until the trust deed should be foreclosed, and the same was thereupon suspended, but with the understanding that if Hill and Taylor should become the purchasers of the property at the foreclosure sale, they would then complete their purchase from Hewett, accept his

deed, and pay him the margin of difference, if any, between the contract price agreed on with him and the amount bid at the sale. It does not definitely appear what the original contract price to be paid Hewett was. It is stated in general terms by Taylor to have been eight thousand or ten thousand dollars, he does not remember definitely, and there is no other direct evidence of the amount. There were several years' back taxes due upon the property, which Hill and Taylor assumed to pay in their purchase from the trustee, and it is fairly inferable that these taxes, and the one thousand dollars paid Hewett, made up the margin of difference between the contract price and the amount paid the trustee.

Now, upon this state of facts, what is the effect of the transaction on the title of the devisees of Mrs. Walker? Does it constitute such a fraud upon their rights as, if they were here now complaining, would entitle them to relief against the purchasers at the trust sale? Undoubtedly, if the sale was brought about by Hill and Taylor for the purpose of defrauding the devisees of Mrs. Walker out of their estate in remainder, it could not be allowed to prevail against them, and probably the same result would follow if its purpose were otherwise fraudulent or unlawful. But the real question is, was it fraudulent or unlawful as against any one? The purchasers having no knowledge of the will of Mrs. Walker, it is not possible that they could have purposed any prejudice of her devisees.

Mrs. Hays was known by them to be the only heir, upon whom they believed the property had descended, and they knew she had conveyed her entire interest in this land to Hewett. It is equally impossible, therefore, that their purpose could have been to injure her. It is perfectly obvious, on the other hand, that the persons against whom they were seeking protection by the foreclosure, were neither the heirs nor the devisees of Mrs. Walker, but the holders of the notes, the incumbrancers of the land. They knew, it is true, that Hewett had assumed the payment of this incumbrance, but they could not ascertain from the trust deed how much remained unpaid, nor had they any certain and convenient means of doing so in any way. The notes were payable to a corporation of another State. It was possible that some of the notes that were claimed to have been paid had not in fact been paid. It was also possible that the land might be made liable to the general creditors of Mrs. Walker for their debts. Hill and Taylor, therefore, had good reason for being unwilling to take upon themselves so uncertain and elastic an obligation as Hewett had assumed, and the proof is they did positively refuse to do so.

Being desirous of acquiring the land, and unwilling to assume the incumbrance on it, or to buy subject to it and take the risk of other liabilities that might come against it—was there any thing unlawful or improper in Hill and Taylor

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becoming active or instrumental in moving the creditor or the trustee to proceed to foreclosure in accordance with the terms of the trust, and in buying the land at the sale, made openly upon public advertisement and competitive bidding, and with no object in view but the extinguishment of the creditor's remedies against the land? We hold most unquestionably not. No fraud can be predicated of such a transaction. It was perfectly innocent and lawful, and just such a course as would have suggested itself to any prudent business man under similar circumstances.

But it is further insisted for the Land Company that Hill and Taylor were affected with notice of the existence and terms of Mrs. Walker's will, because, first, the will had been probated and placed upon the public records of the county, and the law therefore presumed their knowledge of it; and, secondly, in Hewett's deed from Mrs. Hays and her husband and son, it is recited that Hewett, as a part of the consideration thereof, had conveyed to them a tract of land in Mississippi County, Arkansas, and in this latter conveyance it is recited that Mrs. Walker had made a will giving the property in controversy to Mrs. Hays and her children; and it is insisted that Hill and Taylor having accepted a deed from Hewett, they are fixed with notice of the contents of all deeds and instruments recited or referred to in his title papers.

Both propositions are untenable upon the facts of this case. Hill and Taylor claiming, as they do,



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under a deed of trust made by the testatrix in her life-time, and therefore independent of and superior to any title *resting on her will*, the probate and record of the will are not even constructive notice to them. Constructive notice of the will, arising from the fact that it is a public record, extends only to persons acquiring rights or titles which are in some way resting on, or subordinate to, or affected by, the will, and does not extend to those acquiring titles wholly independent of and superior to the will. And again, if the public record of the will were constructive notice of its existence and terms to Hill and Taylor, still it would not be sufficient, for the charge is that they *fraudulently concealed* their knowledge of it, which implies *actual* and not *constructive* knowledge. There can be no fraudulent concealment of a fact of which a party has only constructive or presumptive knowledge, where the absence of actual knowledge is positively proven, as in this case.

The second proposition is answerable in the same way; it is at most constructive notice only. And again, while the general rule is that a party is held to have constructive notice not only of all that appears in the deeds constituting his chain of title, but also of all that appears in all other deeds and instruments recited or referred to in them as being connected with, or as limiting or affecting the title or property conveyed; yet, there are exceptions to the rule, and it does not, in principle, apply to collateral and immaterial conveyances or

instruments incidentally referred to, not as relating in any way to the title or property conveyed, but only to the consideration. Bigelow on Estoppels, p. 341, *et seq.*; 2 Devlin on Deeds, §§ 1000, 1006.

There is nothing in the deed of the Hayses to Hewett, for the land in controversy, to indicate that the deed therein referred to as having been made by him to them for the Arkansas plantation, has any bearing whatever upon the title conveyed to him. It is merely mentioned as a part of the consideration.

It is further insisted for complainant that the effect of the foreclosure sale, and purchase by Hill and Taylor, under the facts and circumstances, and especially in view of the previous understanding with Hewett and their subsequent acceptance of a deed from him, was the same as if Hewett had himself paid off the incumbrance, or had himself purchased at the sale, and then conveyed to them, and that the title acquired by Hill and Taylor must be restricted to that which Hewett acquired by his deed from the Hayses.

This contention is based upon the assumption that the conveyance from the Hayses to Hewett, was only of the life estate of Mrs. Hays and the supposed interest or expectancy of Samuel J. Hays under the will of Mrs. Walker; and it is argued that the effect of the conveyance was to make Hewett tenant for life of the whole land, and tenant in common with James W. and John M. Hays of the remainder.

The position is untenable for several reasons. The deed does not purport to convey a life estate, or interest in common, or any thing less than the whole fee. The vendors covenant that they are seized of the whole estate in the land, and warrant the title against all persons. They also covenant against all incumbrances except those specified. There is no proof that as matter of fact the deed was intended to operate to pass less than the whole fee. Under these circumstances, Hewett's assumption of the incumbrance on the land ought not, at most, to be extended beyond the indemnity of his vendors. Finding that he had obtained under the deed less than he had bargained for, and less than it purported to convey to him, it is at least questionable whether he might not have purchased at the foreclosure sale himself for his own benefit, and thereby perfected his title as against those interested who had not joined in the deed to him. There was no privity of contract between him and them. If there was any privity of estate, it was technical and *in invitum*. Certainly he did not owe it to them to pay the incumbrance for the protection of their interests. But at all events, the obligations of life tenant to remainderman, and of one tenant in common to another, do not arise on the face of this deed.

Again, the conveyance of the Hayses could not have operated as argued, so far, at least, as to create the relationship of tenancy in common, for the reason that Samuel J. Hays was not seized as

tenant in common, but only as a member of a fluctuating class, with no particular or fixed interest.

Again, neither the deed of the Hayses to Hewett, nor Hewett's deed to Hill and Taylor, as has been seen, are necessary to the latter's title. They do not have to rely on them at all. Their title under the trust sale and conveyance was perfected before Hewett's deed was made to them, and by no principle can the latter deed operate *ex post facto* to cut down their previously acquired good title to the limits of the imperfect title held by Hewett.

And lastly, upon the whole facts and circumstances, it is clear that the purchase of Hill and Taylor at the trust sale was made for themselves, and not under or for the benefit of Hewett. They were under no legal obligation to buy the land, either at the sale or from Hewett. They had the right to buy for themselves as fully as did others who attended the sale and bid. The sale was in all respects open and fair. Having bid the highest price offered, paid it, and taken the trustee's deed, the fact that they chose to pay Hewett an additional sum, and accept a deed from him, in pursuance of a previous verbal agreement with him to do so in case they became the purchasers at a figure that would justify them in so doing, cannot be held to vitiate their purchase, and destroy their deed from the trustee as a muniment of title, proceeding from the maker of the deed of trust.

There being, then, no defect in Hill's title at the time of his sale to the complainant Land Company,

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it follows that even if the latter had made its purchase on the faith of his representation that his title was good, it would not show fraud, for the double reason that such representation would have been true, and have produced no injury. But it very clearly appears that complainant did not act upon any representation of Hill in respect to the title, but investigated the same for itself upon an abstract furnished by a regular abstract company of the city of Memphis, which purported to exhibit the entire record of the title, beginning with the conveyance to Mrs. Walker, in 1844. This abstract was submitted by complainant to learned counsel, of its own selection, for his examination and opinion. He gave a carefully prepared and elaborate opinion in writing, approving the title as good and perfect, and on the faith of that complainant made the purchase.

In this opinion, after a reference to the deed made to Hill and Taylor by the trustee, the learned counsel adds, "But outside of the title derived from the sale under said trust deed, on March 6, 1877, Elizabeth M. Hays, whom I understand to be the only child and heir at law of Mary Ann Walker, who died in 1873, together with her husband, A. J. Hays, sold and conveyed the forty-four acres to Chas. Hewett, subject to the foregoing trust deed. \* \* \* This deed conveyed a good title to the forty-four acres to Chas. Hewett, subject to the incumbrance of the deed of trust to Wellford, and subject to whatever debts Mary Ann

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Walker may have owed at her death, *she dying intestate.*"

The abstract of title contained no reference to the will of Mrs. Walker, and it is very clear that Hill had no knowledge of such a will until after his sale and conveyance to complainant, so that, even if the will were material to the title, Hill was guilty of no misrepresentation in regard to it.

The result is, we hold that the Chancellor's view of the case is correct, and it is, therefore, unnecessary to consider the other question suggested at the outset.

Affirm the decree with costs.

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Harmon v. Railroad.

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## HARMON v. RAILROAD.

(Jackson. May 7, 1889.)

3pi 614  
4pi 41587 614  
110 46487 614  
117 228\*1. RAILROAD. *Nuisance. Successive actions.*

If a railway company, lawfully located upon a street in a city, under its charter, and by permission of the local government, uses the street in the operation of its road beyond what is necessary for the proper running of its trains, and by such excessive and improper use substantially destroys the easement of way, and of ingress and egress appurtenant to an abutting lot, the owner of such lot can maintain successive actions for such nuisance, recovering the damages that have accrued up to the time each action was brought, and a recovery in one action will not bar a subsequent one brought for a continuance of such wrongs.

Cited and approved: *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y., 98; *Bingham v. I. M. R. R. Co.*, 87 Tenn., p. 522; *Smith v. Street Railway Co.*, 87 Tenn., p. 626.

2. SAME. *Measure of damages.*

The measure of damages in such cases is the impairment of the value of the use of such property by such nuisance during its continuance. The difference in the market value of the property cannot be considered.

Cited and approved: *G. R. & I. R. R. Co. v. Heisel*, 38 Mich., 62; 31 Am. Rep., 313.

## 3. RES ADJUDICATA.

If suit be brought for such nuisance, and the entire destruction of the easement be alleged, and a charge is submitted to, fixing the permanent impairment of the value of the property as the measure of damages, and there is a recovery and payment, plaintiff cannot bring a subsequent suit for the continuance of such nuisance.

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FROM SHELBY.

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Appeal from the Circuit Court of Shelby County.  
L. H. ESTES, J.

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\* Syllabus prepared by Judge delivering opinion.—REPORTER.

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Harmon v. Railroad.

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GANTT & PATTERSON and A. H. DOUGLASS for  
Harmon.

HOLMES CUMMINS for Railroad.

J. M. DICKINSON, Sp. J. Plaintiff owned a parcel of ground in the Taxing District of Shelby County by deed, which described it as being "one hundred and fifty feet on the north side of Jackson by one hundred and seventy feet on the west side of Eighth Street." The Tennessee Southern Railroad Company, to whose rights and liabilities defendant, the L., N., O. & T. R. R. Co. succeeded, by permission of the Taxing District, and in accordance with a contract made with it May 22, 1883, graded under the supervision of the Engineer of the District, and upon the grades fixed by him, Eighth Street, in front of plaintiff's property, and laid down upon it three lines of railway track. Defendant, at the time the suit was brought, and prior thereto, ran its cars and engines over said tracks in the prosecution of its business as a common carrier with great frequency, both by day and by night. On November 8, 1883, plaintiff brought suit in the Circuit Court of Shelby County against the said Tennessee Southern Railroad Company for injuries alleged to have been done said realty by the said grading of Eighth Street, and the building and operation of said railroad. The declaration alleged ownership in plaintiff of the ultimate fee in the street, and also an easement of



way appurtenant to the abutting lot; that defendant had practically closed the street with its tracks, excavations, and fills, so as to utterly destroy its use and value as a highway, and had converted it to its exclusive use for its cars and engines; that the tracks in front of plaintiff's premises were used for leaving cars at night, and placing and switching engines; that plaintiff's business, carried on upon said lots, had been greatly injured, and that the property was damaged in the sum of five thousand dollars.

Defendant, by plea, denied that the street was practically closed, that it was destroyed as a highway, and that plaintiff's ingress, egress, and right of way appurtenant to said property were impaired.

Plaintiff, at the trial, offered proof tending to show that defendant had placed three tracks on Eighth Street; that prior to that time this street had been the principal way of approaching his lot; that the grade had been raised by defendant putting a high bank of earth along one hundred feet of his lot, resulting in backing the water on said lot and making it marshy; that the tracks occupied nearly the whole of the street, so that plaintiff could not pass to and from said lot with vehicles because of the cross-ties and rails, and that he was excluded therefrom by the constant and uninterrupted occupation of said street by engines and cars passing and standing there; that defendant, throughout 1884, habitually left its en-

gines and cars standing on said street in front of plaintiff's lot, and made it dangerous and impossible for vehicles, animals, or persons to go upon said street; that said realty, prior to the occupation of said street by the defendant, as aforesaid, was worth five thousand dollars, and that because of said appropriation and occupation it had deteriorated in value to the extent of from two thousand five hundred to four thousand dollars; that engines have been allowed nightly, and all night, to stand in front of said premises and escape steam; that plaintiff could make no use of said street as a highway for vehicles, or for horses; that since the tracks of defendant were placed upon the street it was not used for the ordinary purposes of a street, nor could it be so used with safety or convenience by the public.

Defendant introduced proof tending to show that the property was not lessened in value "on account of its occupation of said Eighth Street with its tracks or its engines and cars." It introduced no evidence to controvert the character of the occupation and use as alleged and proven by plaintiff. None of the evidence was excepted to.

The Court charged that defendant had the privilege to use Eighth Street to the extent of laying down and operating three tracks in the prosecution of its business, and that plaintiff could recover nothing for this, nor for the injuries incident to the grading done pursuant to the contract with the Taxing District.

It was further charged that defendant was not entitled to the exclusive use of the street, that its use must be reasonable, such as would not materially interfere with the use of the street by plaintiff for ordinary purposes; that defendant had no right to leave its engines or trains standing on said street so as to interfere with or obstruct travel on or over said street, except as the same is incidental to the proper running of trains; that if defendant had exceeded the proper uses as limited, plaintiff could recover all damages sustained by such excessive use, to be arrived at by considering depreciation in value of plaintiff's property, the impairment in the value of its use, the injury to the property by the passing of trains, and annoyance from noise, sparks, smoke, and the danger from fire caused by the use made of the street by defendant.

Defendant excepted to the charge, but made no request of the Court. A verdict was rendered for five hundred dollars. Both sides appealed, but neither perfected the appeal, and the judgment was paid.

Plaintiff brought the present suit March 10, 1886, making substantially the same allegations in regard to the laying of tracks, and grading, and injury to property and business therefrom as were set out in the former suit.

He alleges that the cars are run on said street at excessive and dangerous speed; that they are frequently left standing thereon; that his rightful

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use of said street is impaired; that since the former suit defendant has repeated the wrongs therein complained of, and has committed other wrongs, such as not filling between its tracks, so as to make its road even with the grade of the street, keeping its track elevated one foot above the surface of the street, allowing open spaces between its cross-ties, thus impairing the proper use of the street as a highway to the injury of plaintiff's easement.

It is alleged that defendant has made, by day and by night, running, flying, kick, and drop switches, all of which are highly dangerous to and destructive of plaintiff's easement; that defendant stores its cars on said tracks, and uses them as a switch yard, blockading the street and cutting off access to plaintiff's premises; that engines are stopped there for hours to be cleaned, making loud noises, all to the impairment of plaintiff's rights in said street.

Defendant relies upon the plea of *res adjudicata* in bar, and sets out all of the pleadings and proceedings under the former suit. The Judge ruled out all testimony offered by plaintiff to sustain his declaration, and instructed the jury that the former judgment concluded plaintiff, and there was a verdict for defendant.

Plaintiff unquestionably is concluded by the former suit as to all damages arising from the taking of the street for ordinary railroad purposes and the grading incident thereto. Such occupation

by defendant under its charter and the contract with the Taxing District was lawful, and the use and the consequent injuries were permanent in character. Plaintiff had a right to recover compensation for the new burden imposed on the fee of the street if he owned it. *G. R. & I. R. R. Co. v. Heisel*, 38 Mich., 62 (A. R., 31, p. 306).

The Court charged that plaintiff could not recover therefor, and the plaintiff submitted to the charge without prosecuting an appeal, and cannot now litigate that question again. But another class of injuries—those alleged to be nuisances growing out of the improper operation of the road and use of said street, and transitory in their character—were complained of in the former suit. The declaration in this suit alleges a continuance of these wrongs, and embraces others of the same character not specifically set out in the former declaration.

There is a broad distinction between those injuries occasioned by causes permanent in their character, and which are likely to continue, with no right in plaintiff to abate them, and those which arise from nuisances which may be discontinued.

In respect to the former, the entire damages, past and prospective, can be estimated, and the cause of action cannot be split up, while as to the latter it is not to be presumed that the wrongs will be continued; and it would be unjust to defendant to allow plaintiff to recover damages estimated upon such an assumption. On the other

hand, it would be equally wrong, to permit defendant to insist upon such a rule of compensation, and thus become vested with a perpetual license to commit a nuisance to the injury of plaintiff and over his protest.

An illustration of the first class is where a railroad, lawfully located, impairs private rights in a street. The injury is permanent, and does not proceed from an abatable nuisance, and the damages must be recovered in one action. If the road be constructed without warrant of law it is an abatable nuisance, and successive actions may be brought for its continuance, and the damages following therefrom.

The most thorough review of the authorities on this question ever made is by Earle, J., in *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y., 98. The rule is thus stated:

“He claims that the interference by the defendant with the street was unlawful and a nuisance, and that therefore the plaintiff was entitled to recover damages caused thereby; and if he is right in his contention that this embankment placed in the street by the defendant was unlawful, and therefore a nuisance, then the plaintiff was entitled to recover damages. The question, however, still remains, What damages? All his damages upon the assumption that the nuisance was to be permanent, or only such damages as he sustained up to the commencement of the action? There never has been in this State before this case the

least doubt expressed in any judicial decision, so far as I can discover, that the plaintiff in such a case is entitled to recover only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the Courts; and it is the prevailing doctrine elsewhere."

In conclusion he says:

"I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued, and that the wrongdoer will not discontinue or remedy it, and that the convenient and just rule sanctioned by all the authorities in this State, and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive action until the wrong or nuisance shall be terminated or abated."

This is undoubtedly the correct rule, and there is no difficulty in its application if the distinction is observed between those injuries coming from permanent and lawful use of a street by license of government and those which flow from an improper use in excess of such license.

If a railroad be constructed on a street in pursuance of its charter and permission of local authorities empowered to license such use, and grades the street under the direction of such local government, it is not a nuisance, and cannot be abated as such. Notwithstanding such grant of occupation it is liable to the abutting owners for the new burden imposed upon the fee of the street if

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they own it, or for any substantial destruction of the easement in the highway appurtenant to their property resulting from an abuse of railroad privileges. This was decided at this term in the case of *Bingham v. I. M. R. R. Co.*, 3 Pickle, 522, and *Smith v. Street Railway*, 3 Pickle, 626.

Such taking is lawful and permanent, and cannot be discontinued at the instance of those injured. They can only insist upon compensation for the injury to their property. The damages for such injuries can and must be estimated in one action, and a recovery in one suit, whether based upon the correct or an erroneous rule of estimating the damages, will bar any subsequent suit.

All uses of such street in excess of what is necessary for the ordinary and proper operation of the road, such as running trains faster than permitted by law, making dangerous switches, parking cars, using it as a switch yard, keeping engines and trains standing unnecessarily long (if such uses substantially destroy the easement in the highway and the right of ingress and egress), are unlawful, and may be abated. Such uses are not of a permanent character, but are recurrent, and every act is a new wrong, and successive actions may be brought, each recovery embracing only the damages sustained up to the commencement of the action. It vests the defendant with no right to continue the wrongs, and affords no protection against a subsequent suit.

In such case the measure of damages would be



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confined to the temporary injury inflicted by such nuisance in diminishing the value of the use of the property, and it would be error to admit evidence going to show a diminution in the selling value of the property, for this would involve the consideration of permanent injury. *G. R. & I. R. R. Co. v. Heisel*, 38 Mich., 62 (31 A. R., 313).

The majority of the Court holds that the plaintiff in this case is concluded by his former recovery, notwithstanding the rule adopted, because he alleged in his declaration and proved an entire appropriation of the street by defendant by its manner of use to the destruction of it as a highway; and for the further reason that he proved his damages and recovered upon the basis of permanent injuries measured by the difference in the market selling value of his property.

Inasmuch as he treated the injuries as permanent, and recovered and received compensation therefor, obtaining a charge on the theory of permanent injury without appeal therefrom, the Court holds that he cannot now sue for injuries which were, by his election, paid for in advance.

In this proposition I do not concur. It makes the former suit equivalent to a deed from plaintiff to defendant to all his rights in the street which he had as abutting owner. It estops him from complaining of any uses to which defendant may put the street, though such uses may be, as is alleged in the present declaration, different from those complained of in the former suit. Plaintiff had a

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right to allege and prove that defendant's abuses had, in effect, entirely destroyed the street as a highway, in order to show the extent to which his rights had been invaded, and he did not thereby imply that they would be continued, or that he intended to surrender his rights in the street. Does the fact that his damages were alleged and proven on a wrong basis conclude him? If so, then it would have been equally potent, though the declaration had, in express terms, alleged that the nuisance was not of a permanent character, and should be abated. If the defendant submitted to a rule of damages that was erroneous, and paid on the basis of diminution in the market value of the land, when for nuisances not permanent in character he should have paid on a different basis, he should not acquire thereby a permanent right to commit such nuisances. It was his duty to ask the Court for a correct charge, or appeal, and not to pay for temporary wrongs under a rule applicable alone to those which are permanent.

Judge Caldwell concurs in this dissent.

Judgment affirmed.

3pi 636
4pi 747
87 626
117 228

## SMITH v. STREET RAILROAD.

(Jackson. May 7, 1889.)

1. STREET RAILROADS. *Construction of charter. Abutting owners.*

Street railway company organized under our General Incorporation Act (Acts 1875, Ch. 142, § 13), having, by lawful contract with the city, permission to construct its road over the public streets, is not required, in addition, to obtain consent of abutting lot owners where they do not own the fee in the street, or in any case where the proposed road is not of a character to be an additional burden upon the fee in the street.

Act construed: Acts 1875, Ch. 142, § 13; Code, §§ 1920-1925 (M. & V.)

2. SAME. *Not additional burden upon the fee, when.*

Street railroad operated by horse power is not an additional burden upon the fee in the street, but an improved use of the street strictly within the original purpose for which it was appropriated to public use.

Case cited and approved: 38 Mich., 63 (S. C., 31 Am. Rep., 309.)

*Question reserved:* Is a steam dummy line an additional burden upon the fee in the street?

3. SAME. *Powers. Liability to abutting owners. Ingress and egress.*

Street railway companies have no right of eminent domain; and can acquire no right by contract with city to obstruct, for purposes of its construction, the right of ingress and egress appurtenant to the abutting lots, even where the owners thereof have no fee in the street. But construction of road upon city's established grade of the streets, under a lawful contract with the city authorities, and in a lawful manner, exonerates the company from liability, in this particular, to the abutting owners.

4. SAME. *Unlawful operation of road.*

After a street railroad has been lawfully constructed the company is liable to abutting owners for any damages resulting to them from the unlawful or excessive use of the road.

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Cases cited and approved: Bingham v. Railroad, *ante*, p. 522; 31 Am. Rep., 312; 108 U. S., 317.

5. MEASURE OF DAMAGES. *Nuisance.*

The rule laid down in Harman v. Railroad, *ante*, p. 614, approved.

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FROM SHELBY.

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

JOHN D. MARTIN for Smith.

TURLEY & WRIGHT and MYERS & SNEED for Street Railroad.

CALDWELL, J. This action was commenced in the Circuit Court of Shelby County by Tillie M. Smith, an abutting lot owner, to recover damages from the East End Street Railway Company for the alleged unauthorized construction and unlawful operation of a street railway line upon and along Monroe Street, in the city of Memphis.

Verdict and judgment being adverse to the claim of plaintiff, she appealed in error to this Court, and has here assigned numerous alleged errors in the action of the Trial Judge, on account of which she seeks a reversal and new trial.

The defendant company laid out and constructed its railway under a "contract with the city authorities," but without any contract or agreement with the owners of lots abutting on the street.

The plaintiff did not give her consent, and she claims that the use and occupation of the street by the defendant without her permission is a violation of her rights as an abutting lot owner, and therefore illegal. Her contention is that the defendant's *charter expressly required it to obtain the consent of abutting lot owners*, as well as that of the city authorities, before it could lawfully construct and operate its road in a public street.

Her counsel submitted this construction of the charter in appropriate written instruction, and requested the Trial Judge to give it to the jury as a part of his charge. This His Honor declined to do, and, instead of charging as requested, told the jury that, having obtained the consent of the city by its contract, the defendant had the right to construct and operate its road upon the street without the consent of the plaintiff or of other persons owning property on the side of the street.

This action of the Court is assigned as error, and upon that assignment the charter comes up for construction.

The defendant was incorporated under Section 13 of Chapter 142 of the Acts of 1875, which section was subdivided by the compilers, and carried into the Code (M. & V.) at §§ 1920 to 1925 inclusive. By operation of law, and in fact, all

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the provisions of that section are embodied in and made parts of the defendant's charter. So much of it as bears upon the question now under consideration is 'as follows:

"The said company is authorized to consummate any contract with the city authorities of the town aforesaid, or with the County Court if the route extends or is to be extended beyond the limits of said incorporated town, or with private individuals necessary to get the right of way along the public streets of the city, or along the public roads of the county; *provided*, that no one of the streets of said city shall be used by said company, nor shall any rails be laid down until the consent of the city authorities has been first obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done; or, if said road extends into the country, the consent of the County Court must be first obtained." Code, § 1921.

This provision of the law is confessedly not so perspicuous as might be desired. Nevertheless, we think the intention of the Legislature is reasonably certain. The general purpose was to facilitate what the Act calls street railroads, whose lines might extend into the country upon the public roads of the county, and in some instances—in the town or out of it—pass over the property of private individuals. The right to exercise the power of eminent domain was not conferred, but withheld, and the only method provided by which the necessary

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right of way may be obtained is the consummation of a contract with the city authorities, the County Court, or private individuals, the manifest intention being that the company must get the permission of the city authorities to run its road upon public streets, of the County Court to extend the line on the public roads of the county, and of private individuals when it is deemed necessary to pass over property exclusively their own.

Each abutting lot owner has an easement of way in the public street which the law recognizes as his private property (*Anderson v. Turbeville*, 6 Cold., 158), but that affords no good reason why he should be consulted about the construction of a street railway, when it is remembered that the town or city authorities hold the streets in trust for the public (*Humes v. Mayor*, 1 Hum., 403; *Mayor v. Brown*, 9 Heis., 1), and have the better means of determining what the convenience of the public demands.

The interpretation contended for by the plaintiff would destroy the Act itself, and make it a dead letter upon the statute book, for it cannot be expected that any company *could obtain the consent of every abutting lot owner*, so varied are the tastes, thoughts, and habits of persons composing a large community. Moreover, married women, minors, and persons of unsound mind, are not competent to make the required contract. So it is seen at once that the effect of such a construction would be to exclude street railways from every street on

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which an eccentric person, or person under disability, might own property, though the desire and demand for them by the other abutting lot owners, and the city authorities, might be unanimous and earnest.

It cannot be supposed that the Legislature went through the form of passing a general law, intending at the same time that its objects should or might be defeated entirely by the will or incompetency of one person in a community, when every other person and the recognized legal agency of the public were endeavoring to get the benefit of the legislation. Certainly the Courts will not infer that such was the legislative intent when it is not clearly so expressed.

It is altogether right and reasonable to require the consent of private individuals to the use of property in which the public has no interest. It is with respect to the use of such property, and not with respect to the use of public streets or public roads, that the law requires private individuals to be consulted. If the owner be incompetent to make the requisite contract it cannot be made, and the property cannot be used, for the public owns no interest in it, and there is no one to represent the incompetent person as in the case of public highways in the town or country.

Again, the correctness of the interpretation we have given the Act is clearly shown by the proviso which permits the construction of the railway along the streets after the consent of the city



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authorities has been obtained, and terms have been prescribed by ordinance, without reference to the consent of private individuals. It would be idle to authorize the company to make a contract with private individuals for the use of a public street, and then empower the company to construct its road in such street on the authority of the city alone.

No additional light is thrown upon the question by the later provision (found in Code, §1925), that, "The powers herein granted are in no manner to interfere with the rights of private citizens or private property." The meaning of that provision is that plainly expressed by the words used. It is a reservation of the legal rights of private persons as they existed before, without increase or diminution—a saving of all rights of action for any unlawful use or obstruction of the public highways, or other wrongs and abuses.

The plaintiff averred that, under her deed and the law applicable, she owned the fee in the soil to the center of the street, and that the use and occupation of the street by the defendant was the imposition of an additional burden for which she was entitled to recover damages. On the refusal of the Court to so charge she assigns error.

It is well settled that a steam railway is a burden not ordinarily contemplated in the dedication or condemnation of land for a public street, and, as a consequence, that the original owner, in whom the ultimate fee resides, may recover com-

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pensation for the subjection of the fee to such new and independent use. 2 Wood's Railway Law, 724 and 740; 1 Rorer on Railroads, 518; 2 Dillon's Mun. Corp., §§ 703, 724, and 725; Mill's on Eminent Domain, § 204; *Railroad v. Heisel*, 31 Am. Rep., 310, S. C., 38 Mich., 64; Am. and Eng. Ency. of L., Vol. 6, pp. 552 and 553, and cases cited; also *Bingham v. Railroad*, 3 Pickle, 522.

A street railway, however, is not regarded as an additional burden upon the fee, but as an improved use strictly within the purpose for which the street was laid out in the first instance, for which no additional compensation is, ordinarily, allowable. 2 Wood's Railway Law, 739; 2 Dillon, §§ 722, 724, 725; Mill's on Eminent Domain, § 205; 31 Am. Rep., 309, S. C. 38 Mich., 63; Am. and Eng. Ency. of L., Vol. 6, p. 555, and cases cited.

Whether the fact that the cars upon a street railway are propelled by "a dummy steam engine," as in this case, instead of by horse power, so changes the use as to make it an additional burden for which damages are recoverable need not, be decided in this case, for, in reality, the plaintiff is not the owner of the fee in the street.

It is true that her deed calls for Monroe Street as one of the boundaries of her lot, and that this, as a matter of law, would ordinarily invest her with the fee in the soil to the center of the street, *ad flum viæ*, as a call for a non-navigable stream of water carries title to the thread of the

stream, *ad flum aquæ*. But that general rule cannot be applied in this case, for the reason that the person under whom the plaintiff claims title to her lot did not himself own the fee in the street at the time she obtained her deed. He had previously owned the land in the street, as well as the abutting lots; but at the time plaintiff acquired title to her lot he had no title to the soil of the street, having long before divested himself of the same by an absolute deed in fee, with covenants of warranty, to the city. So that he, at most, had only a private easement of way in the street, and not the fee, when plaintiff bought and took a deed to her lot; and it cannot, of course, with any show of reason or law, be claimed that she took more than he had to give.

That the city first condemned the land for a street does not change the legal effect of his deed, which, in appropriate language, passes the whole fee to the soil for a full and fair consideration recited.

The Court instructed the jury that the plaintiff, as an abutting lot owner, was entitled to the free and unmolested use of the street for purposes of ingress and egress to and from her lot, and that the impairment of the use for such purposes, if shown by the evidence, would be an element of damage in this case.

Plaintiff's counsel insists that this instruction is erroneous, because it confines her right of recovery to the impairment of her use of the street for purposes of *ingress and egress merely*.

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We think the charge as favorable to the plaintiff as it could have been under the law. An abutting lot owner, such as the plaintiff is shown to be, without more than an easement of way, and not owning the ultimate fee in the soil, certainly enjoys all that reason entitles her to claim, and all that the law will allow when she has the free and unobstructed use of the street for all purposes of ingress and egress. For such purposes she may use the whole street, or so much of it as may be necessary; but in so doing she cannot have the exclusive use for herself at all times, nor can she recover damages for the use of it by others, unless such use be excessive or incompatible with her rights as already defined.

Her only private property in the street is her right of ingress and egress; she has no other right or interest in the street which is not to be enjoyed equally by each and every member of the community and the public generally.

To entitle her to claim damages she must sustain some private or particular injury; something must be done which injures her access to her lot on the street before she can sue successfully. Inconvenience or annoyance, which she suffers in common with the public, gives no right of action. 1 Rorer, 521; 31 Am. R., 312; Am. and Eng. Ency. of L., Vol. VI., p. 550, and cases cited.

As to the effect of the contract with the city authorities, the Trial Judge charged the jury, in substance, that the defendant would not be liable

to abutting lot owners for damages resulting from the construction of its road along the street, if its work was done in compliance with the terms of its contract with the city.

This is not a sound proposition. Manifestly an unlawful contract with the city could not protect the defendant in doing a wrong to a private person or his property. No contract can legalize an unlawful thing, or shield the wrongdoer from the legal consequences of his wrongful act. The city can no more authorize another to place an unlawful obstruction in the street than it can do so itself.

This error, however, is harmless in this case, for the record shows that the contract in question was a proper and lawful one, and that the defendant constructed its road according to the contract, and upon the city's established grade of the street.

Having constructed its road in a lawful manner, and in accordance with a lawful contract with the city authorities, as required by its charter, the defendant can be liable in damages to the plaintiff only for the unlawful use and operation of its road. Any use that may be excessive or amount to a nuisance will be unlawful, and give the plaintiff a right of action. 31 Am. R., 312; 108 U. S., 317; 1 Rorer, 521; *Bingham v. Railroad*, 3 Pickle, 522.

For such unlawful acts, if done, the law allows successive actions. A discussion of the right

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Smith v. Street Railroad.

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of successive actions for recurring nuisances and the measure of damages in such cases is found in an opinion delivered by Special Judge Dickinson, at the present term, in the case of *Harmon v. Railroad*, 3 Pickle, 614.

Objection is also made to the charge with respect to a certain water tank erected and used by the defendant on another lot in the vicinity of the plaintiff's property. It is not necessary to notice this charge further than to say that the plaintiff could, in no event, have a recovery for damages resulting from the proximity and use of the tank, because she makes no claim for such damages in her declaration.

The other errors assigned need not be mentioned in detail. Most of them are necessarily dependent upon and disposed of by rulings already made in this opinion, and the others are not material.

Let the judgment be affirmed.

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State v. Hill.

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STATE v. HILL.

(Jackson. May 9, 1889.)

1. TAXES. *Lien of. Not lost by sale of realty under decree, when.*

Real estate sold under decree of Court, in a proceeding to which the State or other tax creditor is not a party, is not thereby exonerated in the hands of the purchaser at such sale from an existing lien for unpaid taxes due thereon, unless there has been, as required by Act of 1871, Ch. 68, an ascertainment, by proper reference, of the amount of taxes due at date of sale, and an order directing their payment out of the proceeds realized from such sale.

Act construed: Acts 1871, Ch. 68; Code (M. & V.), § 806; § 674a (T. & S. Addenda.)

Case cited and distinguished: *Williams v. Whitmore*, 9 Lea, 262.

2. SAME. *Duty of purchaser at judicial sale.*

The purchaser of land sold under decree of Court must, at his peril, obtain reference for ascertainment of taxes, and order for their payment out of proceeds of sale.

3. SAME. *Same. Notice to collector of taxes.*

Notice of taking the account to ascertain amount of taxes due at date of sale should be served on the proper tax collector.

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FROM SHELBY.

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Appeal from Chancery Court of Shelby County.

B. M. ESTES, Ch.

Attorney-General PICKLE, F. H. HEISKELL, and  
C. W. HEISKELL for Complainants.

MALONE & MALONE and HILL & WILKERSON for  
Respondents.

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State v. Hill.

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LURTON, J. This is a bill filed by the State under Act 1882, being "An Act to provide for the more efficient collection of back taxes." The controversy involved in this appeal is as to the liability of a certain lot of ground, now owned by Mrs. Ida Hill, for State, county, and city taxes for the years 1877 to 1881, inclusive. This lot was purchased by her in 1881 at a Chancery sale under a decree in the cause of *Taylor et al. v. Taylor*, then pending in the Chancery Court of Shelby County.

It is agreed that she has paid all the purchase money into Court in that cause, and that title has been vested in her. The taxes now claimed were an incumbrance on the lot at the time of the sale. The purchase money was distributed without paying the taxes on this lot, and it is agreed that there was no order made directing the Clerk to report or pay the taxes.

The Chancellor was of opinion that the taxes constituted a specific lien upon the property, and that the lien had not been lost by any of the proceedings under which Mrs. Hill had become the owner.

The contention of Mrs. Hill is, that under the Act of 1871, Ch. 68, carried into Code of M. & V. at § 806, that the lien of the taxes, by the sale under decree of court, was transferred from

- the property to the purchase money.

That Act provides that: "Whenever real estate is sold under a decree of any court of this State



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it shall be the duty of the Judge of said Court, before said sale is confirmed to the purchaser, to have a reference made to the Clerk or Clerk and Master to ascertain if upon the day of sale there were any taxes due and unpaid which were a lien upon said real estate; and if it is found that there were taxes that were a lien upon the real estate, upon the day of sale, a decree shall be entered in the cause stating the amount of taxes, and directing the Clerk and Master or Clerk to pay said taxes out of the first money collected from the sale of the said real estate." The object of this Act seems to have been twofold. First, to expedite and insure the collection of taxes. Second, to settle the controversy as to whether the purchaser was entitled to have the taxes paid out of the purchase money, there being conflict in the decisions of this Court upon the question. *Ellis v. Foster*, 7 Heis., 131; *Childress v. Vance*, 1 Bax., 406; *Stanton v. Harris*, 9. Heis., 579.

The taxes are, by this Act, made a prior charge and lien upon the thing taxed, and overrides all liens, mortgages, and incumbrances of whatever kind, there might be upon the property; for the Act expressly requires that the taxes shall be paid "out of the first money collected from the sale of said real estate."

The purchaser, under a Court sale, may protect himself as against the incumbrance of taxes by causing the purchase money to be applied to the discharge and payment of taxes. If no order is

made before confirmation he may have such order made at any time before the purchase money has passed beyond the jurisdiction of the Court. *Williams v. Whitmore*, 9 Lea, 262.

But suppose, as in the case under judgment, no order is made to ascertain and pay the taxes, is the lien of the taxes lost? We think not. The order directing the Clerk to report is essential to obtaining jurisdiction over the question. If the Court fails to make an order, and the Clerk makes no report, why shall the lien of the tax be lost? Neither the State, county, or city were parties to the cause, and ought not to be concluded by any thing done or omitted to be done therein without some opportunity to assert their claims. Upon a reference being made it would be the duty of the Clerk to give notice thereof to the collectors of taxes within the county, and thus enable the taxes to be ascertained. If no such order is made by the Court it is the privilege of the purchaser to move the Court for such an order, and thus put in motion the machinery of the law whereby the property may be relieved by the payment of the incumbrances out of the purchase money. If no order for the payment of the taxes out of the purchase money is made, the lien will continue against the property.

In the case of *State v. Laura Moore, et al.*, decided at Jackson in 1888, we held that where there had been a reference under the statute, and a report showing taxes due, and a decree ordering pay-

ment of taxes out of purchase money, that the neglect of the tax officers to receive the fund from the Clerk of the Court did not restore the lien to the property, but that the effect of such a decree was to transfer the lien from the property to the fund, and that the State must look to the fund and the responsibility of the Clerk on his bond for taxes so ordered to be paid. That decision we have since followed; but we are not disposed to extend it by holding that the lien is shifted to the fund, where no order to pay the taxes has been made. The Act, as we construe it, gives to the purchaser every protection he can demand, upon condition that he shall see to it that the proper steps are taken to obtain the payment of the tax incumbrance out of the purchase money. To hold that the Judge is to make the order, and that his oversight or refusal shall result in the loss of the lien of taxes, would throw upon tax payers who promptly discharge their taxes an additional burden of taxation fearful to contemplate. No such construction is possible. The case of *Williams v. Whitmore*, 9 Lea, has been relied upon by defendant. There is nothing in that case in conflict with the view we here announce. The controversy in that case was between the purchaser and the creditors entitled to the purchase money. The latter sought to throw the burden of the tax upon the former, because there had been no order of reference before confirmation as required by the Act, and because the purchase money had been actually paid out to the

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State v. Hill.

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creditors before the purchaser made his application to have the fund restored to the custody of the Court and applied to the relief of his purchase from the incumbrance of back taxes. What Judge McFarland says about the purchaser not buying subject to the taxes was said in a controversy between such a purchaser and the creditors entitled to the purchase money.

The decree of the Chancellor must be affirmed with costs.

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Woodward v. Woodward.

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WOODWARD v. WOODWARD, Guardian.

(Jackson. May 9, 1889.)

1. GUARDIAN AND WARD. *Non-resident ward's age of majority. Lex domicilii.*

A minor domiciled in another State, and emancipated, under its laws, from all disabilities of infancy, can receive or recover, in the same manner as an adult, personal funds to which he is entitled by the law of his domicile, held for him by a guardian appointed and resident in this State, and administered under our laws. *Lex domicilii* controls as to ward's capacity.

Code construed: § 3419 (M. & V.); § 2544 (T. & S.).

Cases cited and approved: Robinson v. Queen, *ante*, page 445; 10 How., 93; 129 Mass., 243; 1 Hagg. Ecc. R., 273; 8 Irish Eq. R., 444.

2. DOMICILE. *Of adopted minor child.*

Domicile of minor orphan child, who has been adopted under laws of this State, is that of the adoptive parent with whom it resides.

*Bona fide* change of domicile to another State by the parent effects a like change of the child's domicile.

Code construed: § 4390 (M. & V.); § 3645 (T. & S.).

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FROM SHELBY.

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Appeal from Probate Court of Shelby County.  
J. S. GALLOWAY, J.

T. J. SEMMES and GANTT & PATTERSON for Petitioner.

CRAFT & CRAFT for Guardian.

FOLKES, J. This is a petition by Rosa P. Woodward, filed in the Probate Court of Shelby County, against her guardian, Emmet Woodward, in which she seeks to have a settlement of his guardian accounts, and to have the balance in his hands found due paid over to her.

She alleges her domicile and residence in the State of Louisiana, and sets up and exhibits with her petition certified copies of the proceedings had in that State, whereby she has been emancipated from the disabilities of infancy, under and in pursuance of the statute of the State authorizing, in certain cases, the emancipation of persons who have attained the age of eighteen. The petition alleges that, in consequence of such decree, she is, under the laws of the State of Louisiana, of full age, and as such entitled to demand and receive her estate.

It is shown that both her parents are dead; that her father died of yellow fever, intestate, in 1873, leaving several children, all of whom are now over twenty-one years of age except petitioner, and have received from their guardian their share of their father's estate; that defendant, Emmet Woodward, was appointed guardian for herself and brothers and sisters by the Probate Court of Shelby County shortly after her father's death; that there is now in his hands about \$8,000 belonging to her, which he holds as such guardian; that shortly after her father's death, by proceedings duly had in the Probate Court of Shelby County, petitioner was adopted

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by C. Dickman, the husband of her maternal aunt, under and in pursuance of the statutes of Tennessee in such cases made and provided; that such adoption was with the consent and approval of the defendant, Emmet Woodward, her regular guardian; that several years thereafter C. Dickman removed from the State of Tennessee to the State of Louisiana with the view of taking up his permanent abode there, and has ever since and still does reside there, the State of Louisiana being the State of his domicile; that petitioner, after her adoption, became a member of the family of C. Dickman, her adoptive father, and did remove with him and his family to the State of Louisiana, and has ever since resided there; that Louisiana is the State of her domicile, and was at the time of the judicial proceedings therein resulting in her emancipation. She alleges in her petition that it is her desire, and to her interest, to have and receive the estate coming to her from her said father as aforesaid, by reason of the fact that it is now in the hands of the guardian, only yielding her a revenue of six per cent., charged with the commissions, expenses, and costs incident to such guardianship, while she can readily obtain a permanent eight per cent. investment of her funds in the State of Louisiana, where that rate of interest is legal, freed from costs and expenses of guardianship. She insists that the State of Tennessee will recognize her majority as determined and fixed by judicial decree in the State of her domicile, and

would recognize as valid any receipt, discharge, or acquittance that she might execute to her guardian for her estate now in his hands; and that the Probate Court will order and direct a settlement of accounts, and the paying over to her the balance found to be due, so that the said guardian, and his sureties on his official bond, may be discharged from all further liability.

To this petition the defendant interposed a demurrer, upon the ground that petitioner was still a minor under twenty-one years of age; that the proceedings had in the Courts of Louisiana would have no extra territorial effect by reason of the want of jurisdiction in said Courts over the estate of the ward situated in Tennessee; that the proceedings had in Louisiana are unknown to the laws of Tennessee, and opposed to the policy of Tennessee law, and contrary to the interests of the citizens of Tennessee, and would, therefore, not be recognized in the Courts of this State; that the said guardian is lawfully in possession of said funds under the laws of this State, and has been guilty of no breach of duty in relation thereto; and that said petitioner, being a minor, cannot maintain this action in her own name.

The Probate Judge sustained the demurrer, and dismissed the petition. Petitioner has filed the record for a writ of error in this Court.

There are certain general principles which control the disposition of this case. They are, in the main, well settled; the difficulty lies in their ap-



plication to the particular facts of the case in hand.

"It is elementary that every State has an inherent right to determine the status or domestic or social condition of persons domiciled within its territory, except in so far as the powers in this respect are restrained by duties or obligations imposed upon them by the Constitution of the United States." *Strader v. Graham*, 10 How., 93.

Again, the civil status is governed universally by one single principle—namely, that of domicile—which is the criterion established by law for the purpose of determining the civil status, for it is on this basis that the personal rights of a party—that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy—must depend. *Udney v. Udney*, L. R., 1; Scotch and Divorce Appeals, page 457.

It is not seriously controverted by counsel for defendant that the judicial decree under which the disabilities of minority were removed in Louisiana had the same effect as though, by direct statute, the age of majority had been fixed at eighteen, so far as the status of minors domiciled in that State is concerned. The main contention in this connection being that, the domicile of origin of petitioner having been in Tennessee, petitioner has acquired and could acquire no domicile in Louisiana by reason of her removal to that State by her adoptive father.

Before considering the question of removal and

of the right of the adoptive father to acquire for his adopted child a new domicile, or, what is the same thing, the right or privilege of the adopted child to acquire a new domicile with her adoptive father, let us settle, if we can, what would be the proper disposition of the case had the petitioner been born and ever after domiciled in the State of Louisiana. In such cases we regard it as well settled that under unquestionable principles of private international law one State will recognize and give force and effect in its own tribunals to the legislation of another State, in so far as it fixes the status and capacity of married women and minors. This is frequently spoken of as a principle of comity; and while it doubtless has its origin in considerations of comity, it has been so repeatedly and emphatically recognized by the Courts of all civilized countries that it is now thoroughly crystallized into rules and principles of private international law.

As is said in *Ross v. Ross*, 129 Mass., 243, in the elaborate discussion of the subject by Chief Justice Gray, "the status or condition of any person with the inherent capacity of succession or inheritance is to be ascertained by the law of the domicile which creates the status, at least when the status is one which may exist under the laws of the State in which it is called in question, and when there is nothing in those laws to prohibit giving full effect to the status and capacity in the State of the domicile.

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"We are not aware of any case in England or America in which change of status in the country of the domicile, with the formalities prescribed by its laws, has not been allowed full effect as to the capacity thereby created of succeeding to and inheriting property in any other country, the laws of which hold a like change of status in a like manner, with a like effect, under like circumstances."

This principle is illustrated by the decree made *in re Da Cunha*, 1 Hagg's Ecc. R., page 237, where administration was granted in England, limited to the receipt of the dividend of a sum of English stock, to a Portugese lady who, by the laws of her domicile, was emancipated from the disabilities of minority, but was, by the English law, still a minor. It was held that she was entitled to receive and receipt for the dividend on said stock in England.

It is true, as insisted by counsel for defendant, that there is no elaboration of decision and of discussion made by the Judges in the disposition of this case, but this fact in no manner detracts from its force and effect as authority. It does settle and determine that a person of full age by the law of her domicile, though a minor by the laws of England, is entitled to receive and give a valid acquittance for property to which she is entitled in England; and such receipt, though confined to the dividend on the stock, is as conclusive of her right to act as a major as though she

had received the corpus of the property, the dividend being all that she was, under the circumstances, entitled to. In Rule 32 of Dillcey, we find it stated that the capacity of a person for the alienation of movables depends, so far as the question of infancy or majority is concerned, on the law of that person's domicile. So *in re Hellman's will*, reported in L. R. 2 Eq. 363, Lord Romilly, the Master of the Rolls, authorized the payment of a legacy to a minor aged 18, because she was of age according to the laws of Hamburg, where she was domiciled. The case is stated thus: "Hellman being domiciled in England, by his will, bequeathed the sum of 250 pounds to each of the two children of Charlotte Hilsig; these children were a daughter aged 18, and a son aged 17, both residents and domiciled in Hamburg. According to the law of Hamburg, girls became of age on completing their eighteenth year; boys on completing their twenty-second. The Master of the Rolls said: "I am of opinion that the legacy to the daughter, who is of age according to the laws of Hamburg, may be paid on her receipt. The legacy to the son may be paid on his attaining the full age according to the English law, or according to the law of Hamburg, whichever first happens."

It is suggested, however, in response to this case, that the fact that the property going to the minor was by the will given to the minor by name, is indicative of the purpose to have the same paid over to the minor, according to the law of the place of her domi-

cile, where her majority was reached at an earlier age than in England, and that for this reason it should not be controlling in a case where the property was inherited generally in one State, where twenty-one is the lawful age, and the full age at an earlier period is had by reason of the domicile in another State.

We cannot appreciate the force of this suggestion. The Court, in disposing of the case, indicates in nowise that its judgment or conclusion was influenced by any such consideration, and, so far as the case goes, it is merely an announcement, and application of the general principles contended for by petitioner. Had any special regard been given to the fact that property was devised by will, instead of passing by law, it would have been more reasonable to have supposed that the testator intended it to be paid over according to the law of his own domicile, requiring guardians to receive and receipt for the fund devised to minors. That the Court gave no attention to such considerations, is shown by the order made with reference to the boy, in directing that the fund should be paid to him when he attained his majority, either under the law of England or under the law of his domicile, whichever first happened.

This Court has recognized the doctrine contended for by petitioner in the case of *Robinson v. Queen*, decided at Nashville and reported on page 445 of this volume, where it is held that the judicial proceedings, under the laws of the State of

Kentucky, emancipating married women from the disability of coverture, would be recognized and enforced in this State to the extent of allowing an action to be brought and maintained in the Courts of this State against such married woman, on a note made by her in the State of Kentucky as surety for her husband, clearly recognizing that her status as a person *sui juris* fixed by judicial proceedings in the State of her domicile, would have full force and effect in this State.

To the same effect is the text in Wharton's Conflict of Laws, Section 114, where the learned author says:

"A foreigner who is capable of business at his domicile must be recognized as so capable by our laws, even though if domiciled among us he would be incapable."

A near analogy to the present case, with reference to the recognition in one State of the status fixed by the law of the domicile is to be found in the case of children born out of wedlock, but made legitimate afterward according to the laws of their domicile, by the subsequent marriage of their parents. They are deemed everywhere legitimate for the purposes of inheritance, etc. *Andrews v. Andrews*, L. R. 24, Chan. Div. 637; *Miller v. Miller*, 91 N. Y., 315; *Scott v. Ney*, 11 Louisiana Ann., 232. This doctrine is generally subject to exception concerning real estate, which is governed by the *lex rei sitæ*.

The law of divorce also furnishes a close anal-

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ogy. Thus a divorce in a foreign jurisdiction for a cause which is not competent in the state of marriage, is recognized as valid in the latter if the former had jurisdiction of the parties for the purposes of the suit. *Sewall v. Sewall*, 122 Mass., 158; *Clark v. Clark*, 8 Cushing, 385; *Barber v. Root*, 10 Mass., 260.

In *Stephens v. McFarland*, 8 Irish Eq., Rep., 444, we have a case where a minor was insolvent in Southern Australia, by the laws of which a minor could be so adjudged; his assignee attempted in Ireland to obtain the real and personal property that passed to him under his father's will. The bill was demurred to and the demurrer overruled, the assignee being adjudged to have the title of the property coming to the insolvent minor.

The converse of the present case is found in *Kohne's estate*, 1 Parson's Select Eq. Cases (Penn.), 399; the direct point was that the power of attorney of a minor, who had not reached her majority by the law of her domicile, would not be recognized in Pennsylvania, although by the law of Pennsylvania she was then of full age. The Judge delivering the opinion said, among other things, "that according to our law, in common with those of the civilized world, questions of minority and majority, in all controversies respecting personal estate, are to be determined according to the laws of the country in which the minor held his actual domicile, whether *natural* or *acquired*."

See Story's Conflict of Laws, Secs. 64, 65, 66, and 69.

Pothier states the rule thus: "The change of domicile delivers persons from the empire of the laws of the place they have quitted, and subjects them to those of the new domicile they have acquired."

Mr. Justice Story, after presenting the several views of some of the civil law writers who discuss the subject, says, at Sec. 71: "Boullenois himself does not hesitate to declare the general principle to be incontestable, that the law of the actual domicile decides the state and condition of the person, so that a person by changing his domicile changes at the same time his condition."

The effect of the statute of Louisiana, under which the disabilities of this minor were removed, has been adjudged by the highest Court of that State.

Thus, in 36 La., Ann., 250, it is said: "It places the minor thus freed on the same plain with the major, and invests him with identically the same rights, and subject to equal responsibilities. In other words, instead of leaving him subject to the operation of the general law, and making him wait until he is twenty-one years of age, it virtually and in effect fixed and established his majority at an earlier period of life—that is, at any time when he shall have passed the age of eighteen years." So fully is his majority established that he is capable of filling the office of adminis-



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trator, just as if twenty-one years of age. 12 La., Ann., 155. Under this legislative emancipation the party's disabilities of infancy are all removed. 6 Robinson, 429; 9 La., Ann., 155; 36 La., Ann., 250. He is estopped by it, and those dealing with him need look no further than his free papers. 36 La., Ann., page 616.

The case of *Galbraith v. Buner*, 65 Mo., 349, urged by counsel for defendant as furnishing strong authority for their contention here, is not, in our opinion, entitled to the weight insisted upon. The case is extremely brief in its discussion, and assumes the very point in controversy, without reference to the various authorities bearing thereon.

Mr. Wharton, in his work on Conflict of Laws, at Section 114, says of this case that it is "exceptional" and "arbitrary." Moreover, it may be distinguished from the case now before us in this, that the proceedings in Arkansas, the State of domicile of the minor, seems to have had for its object the emancipation of the minor only *pro tanto*—that is to say, the minor's disabilities were removed to the extent of authorizing him to go into the State of Missouri and there collect and receipt for the particular fund in the hands of his Missouri guardian.

It was not an out and out removal of all the disabilities of minority, but a special commission authorizing an incursion into the State of Missouri for the purpose of receiving and receipting for a particular fund. The Arkansas statute is

not before us, and we only know its contents by the statement thereof, found in this Missouri case, from which it is apparent that it differs widely from the broad and comprehensive proceedings in Louisiana, whereby the petitioner in the case at bar was thoroughly and entirely emancipated from all disabilities, and her status fixed as a major in Louisiana, from which she claims the right to have her status recognized in other sovereignties.

So far we have traveled a broad and well-defined road, from which there is no variableness nor shadow of turning, every step of which is marked by well considered authority of the highest repute.

Let us see, now, what is the effect of petitioner's removal to Louisiana from Tennessee. There is certainly a want of authority directly on the point as to the right of one who has adopted a child to change its domicile. It is settled, however, that the father can change the domicile of his child, as also a widowed mother, by acquiring for themselves in good faith another domicile and carrying with them the child as a member of their family. It was held in the case of *Lamar v. Micou*, 114 U. S., page 223, that minors whose father and mother were both dead, removing in good faith from one State to another in order to live in and become a member of the family of their grandmother, acquired her domicile. This case goes further than we would feel at liberty to go, and we cite it merely as instructive. With us it has been held that a regular guardian cannot change

ward's domicile, and of course the minor himself cannot change it.

Now, under our statute, Section 4390 (M. & V. Code), with reference to the adoption of children there is no limitation whatever upon the power and parental relation that is thereby assumed toward the child so adopted, except that the person making the adoption shall not inherit from the child. The expression of one inhibition is an exclusion of all other inhibitions. The language of our statute is as follows, Section 4390:

"The effect of such adoption, unless especially restrained by the decree, is to confer upon the person adopted *all the privileges of a legitimate child* to the applicant, with capacity to inherit and succeed to the real and personal estate of such applicant as heir and next of kin, but it gives to the person seeking the adoption no mutual rights of inheritance and succession, nor interest whatever in the estate of the person adopted."

One of the privileges of a legitimate child is to acquire a new domicile for itself, when its father acquires one in the place to which they have removed. Here the adoptive father had, unquestionably, the right to carry the child, as a member of his family, to his new home. Is she to be held to submit to removal from the State of Tennessee, and yet deprived of the privilege of acquiring a domicile in the State to which she is removed?

It is a privilege, and one which might be of great advantage and benefit to a child, under many

circumstances, that readily suggest themselves. Are we in a strained effort to protect petitioner from what we can imagine may be an evil to her, to deprive her of the privileges which her relationship to the adoptive father give her under the statute?

And here it may be asked, how could we expect the Courts of Louisiana to recognize the status of *heir*, which the proceedings in Tennessee stamped upon her when she was domiciled here, were we to refuse to recognize the status of *full age*, which the proceedings in that State have stamped upon her?

Under the law that would be established if defendant's contention here were to prevail, and the *lex talionis* be applied, the Courts of Louisiana would refuse to recognize petitioner as the heir of her adoptive father, her only claim thereto resting upon the *status* given by the laws of Tennessee.

It is difficult to see, upon any rule of construction, or of policy, why all the powers possessed by a natural father should not be exercised by him, who, by adoption of a minor, assumes the relationship of parent. It must be remembered that in the case at bar there is no question or suggestion as to the perfect good faith in the change of domicile made by the adoptive father.

Mr. Jacobs, in his work on Domicile, treating of the subject of adoption, says: "By adoption, as it is practiced in many of the States of this Union, the adopted child passes into the family and under

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the control of the person or persons adopting him, and in his relations with them enjoys most of the rights, and is subject to most of the duties, which belong to a child born in lawful wedlock. It would seem to follow that such children, upon adoption, would remain as his in the domicile of his adoptive parents, and that his domicile would follow theirs throughout his infancy in the same manner as if he were their child by nature."

The author adds, however, "but reasonable as this conclusion appears, the writer has not been able to find any authority decisively in point." And we add, that neither reason nor authority has been found to the contrary.

"The Roman law, under which adoption was extensively practiced, is silent with regard to its effect upon domicile, although it treats of its effect upon origin, imposing upon the adopted son double citizenship, viz., both that of his father and that of the person adopting him. This rule was doubtless due to the desire to prevent a person from exchanging the more grievous burden of one country for the lighter burdens of another. \* \* Probably the explanation of the silence of the Roman law in regard to the effect of adoption upon domicile is found in the fact that by that law the domicile of the child did not necessarily follow that of his father by nature, and hence, would not follow that of his adopted father." \* \* Section 247. But in this country, where the domicile of the child follows that of its father

by nature, we can see no reason why the domicile of the adoptive father should not be the domicile of the child."

Again, the author says: "In this country, in the Massachusetts case of *Ross v. Ross*, the language of Chief Justice Gray, in delivering the opinion of the Court, incidentally assumes that where the adoptive father has changed his domicile from one State to another, taking with him his adopted child, the domicile of the latter is thereby changed. In *Foley's* estate, in the Philadelphia Orphans' Court, a briefly reported case, the question was as to the distribution of the personal estate of the minor. Dwight, Judge, said the deceased was a minor at the time of her death in this city. Mary Hamblet, who had adopted her under the Massachusetts statute in 1858, was then, and also at the time of the decedent's death, domiciled in that State. So, too, Thomas Quinn, the father of the minor. In either case, we think the minor also had her domicile in Massachusetts, and he then proceeded to distribute the fund according to the Massachusetts Law." Section 248.

Jacobs, at Section 32, says: "The validity of an act of adoption, and the legal status of parent and child resulting therefrom, depends upon the *lex domicilii* of the parties to it at the time it occurs."

In the absence of authority to the contrary, and upon principle and from analogy, we are constrained to hold that one who has adopted, in good faith, a child in this State, under the laws of this

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State, removing to another State in good faith, acquiring a new domicile there for himself, carrying with him his adopted child, gives to such child a domicile in such State, the domicile of origin giving way to the domicile of choice made for it by its adoptive parent so long as it remains a minor. Of course it is needless to say that when the child attains its majority it can then resume its former domicile of origin, or retain the domicile acquired by the change through the act of its adoptive parent. The petitioner in the case at bar is now, by the law of her domicile, a major, and by her petition in the proceedings in the Louisiana Court, resulting in her emancipation, declares Louisiana the State of her domicile, and in the petition filed in the Probate Court of this State, after the removal of her disabilities, again solemnly declares her domicile in that State; so that, independent of the question as to whether the removal to Louisiana by her adoptive father and his acquiring domicile there *ipso facto* changed her domicile, it might be said that her declarations and conduct after the removal of her disabilities by the laws of Louisiana, her domicile is certainly in that State.

With the question of change of domicile settled, we, upon authority and principle, hold that she has the right to receive from her guardian in the State of Tennessee funds coming to her in consequence of her majority by the law of her domicile. In this connection it may be remem-

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bered that a capacity to take and to have differs from a capacity to do and contract. In short, "a capacity to hold, from a capacity to act," as was said by Mr. Chief Justice Gray in the case of *Ross v. Ross, supra*. We do not understand that, with the matter of removal and adoption out of the way, there is any serious question that a person of full age in Louisiana could receive and receipt for property belonging to such minor in this State. The receipt in such case, accompanied with a discharge, is a contract. There are any number of cases holding that a person who is of full age by the law of their domicile will be held bound by any contracts made by them in another State, where they would not otherwise be of age under the laws of such other State. It is true that it has been held that where a person is of age in the State where they make a contract, though not of full age in the State of their domicile, they will be held bound by their contracts in the State where the contracts were made. This apparent exception to the general rule that the law of domicile fixes capacity, is predicated upon the idea that every State must protect its own citizens from the wrongful acts of the subjects of other States; and while it will always recognize *capacity* as furnished by the law of domicile, it will not always recognize *incapacity* where the person is capable under the law of the State where the contract is made, where it would affect injuriously our own citizens. Authorities upon this aspect of the case might be



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multiplied, but the law as here stated is too well settled to render such citations necessary.

It only remains to determine whether there is any thing in the statutes of this State requiring guardians to hold funds in their hands until the ward attains twenty-one years of age, that militates against the enforcement of the conclusions we have already reached. On behalf of the defendant, it is insisted that the language of the statute in the regard above mentioned is as imperative as would be a provision in the will, or other instrument creating an estate, wherein it was directed that the trustees should hold the fund until the beneficiary should attain the age of twenty-one years. It would be competent for the Legislature to pass an Act impressing such a trust upon funds in this State, without regard to the laws of the State of the domicile of the ward. But does the statute in question do more than provide for wards domiciled in our own State? Is it aimed at non-resident wards? We do not so read nor understand our statute. We consider that the reference to the age of twenty-one years is for Tennessee wards, and is not for the purpose of fixing arbitrarily that particular age at which the guardian shall settle with wards domiciled in other States, but that it uses that age in consequence merely of the fact that under the law of this State a party is a minor until that age is attained, and that the statute, therefore, must be read as though it had merely provided that the guardian should

settle when the ward attained his majority. The statute referred to by counsel for defendant as fixing the age of twenty-one as the earliest period at which a Tennessee guardian can be called on to settle, does not declare a trust in the hands of all guardians until the ward attains twenty-one, as is argued.

This statute is to be found at § 3419, and is as follows:

“Every minor, upon attaining the age of twenty-one years, and every female ward, when she is married, upon the receipt of money or estate due either, shall receipt the guardian for the same, in the same manner as legatees, distributees, or others interested in the distribution of estates.”

The next section provides for the keeping by the Clerks of the County Court of well-bound books in which such receipts shall be recorded. These are the only sections in Article IX., Chapter 2, of the Code. The title of the Article is, “Wards’ receipt on *coming of age*, or marriage.”

Here is certainly nothing showing an imperative policy, or any other policy, that this State proposes to set up for guardians in this State as to funds in their hands belonging to wards everywhere. It is merely a provison aimed at and operating upon the ward, requiring him to give a receipt “on coming of age,” “or marriage,” and providing for the recording of such receipt.

The word “twenty-one” happens to be used in the statute merely because that is the age of ma-

jority at common law, which is the law of this State on that subject—there being no statute declaring it—and the word “twenty-one” is used as synonymous with “full age,” or “coming of age,” as shown by the title to the Article, and as is further shown by § 3358, under the same Chapter—the title to which is “Guardian and Ward,” and Article I., the title of which is, “Who May be Guardian”—where it enacts that such person who fails to deliver up effects of the ward “upon majority or marriage,” is guilty of a misdemeanor. Showing that the terms are used convertibly. This is too plain for citation of authority or rules of construction; but it happens that *in re Kohne’s Estate*, 1 Parson’s Select Equity Cases, p. 399, we have an adjudication that the terms “arrival at twenty-one years,” and “arrival at full age” are synonymous, and convey to the mind identically the same idea.

So that there is nothing in our statute fixing twenty-one years as the age at which a guardian shall settle with wards who are of full age in the State of their domicile. The only provisions on the subject are the two referred to, to wit: that the ward, on coming of age, shall give a receipt; and that if a guardian fails to turn over property to ward at his “majority,” or “her marriage,” he is guilty of a misdemeanor.

So that under our law he is required to settle when ward is of full age; and under the *jus*

*gentium* the petitioner is of full age, and he must settle.

The enforcement of this rule of private international law only requires that the common law age of majority of this State shall give way to the age of majority, as fixed by the law of the domicile of the ward, unless there be something in our statutes or decisions which are to be understood as indicative of a policy or purpose to enforce the particular law, without regard to the rules of private international law, which asks its suspension in favor of the *lex domicilii*. There is nothing in our law on the subject in hand upon which can be predicated the demand that the *jus gentium* shall not prevail.

Under the view we take of the law governing this case, the petitioner has attained her majority under the laws of the State of her domicile, and this Court, recognizing the status of capacity as thus fixed by the law of her domicile, will declare her of full age, so far as her right to demand and receive from any one having property in their possession belonging to her, to which she would be entitled upon attaining full age in this State.

In other words, being of full age in Louisiana, the State of her domicile, she is of full age in this State, under the principles of private international law obtaining in such cases.

Let the judgment be reversed, and the case remanded for further proceedings.

Spi 668  
4pi 638

## HEISKELL v. CHICKASAW LODGE.

(Jackson. May 11, 1889.)

## 1. CHARITY DEFINITE.

A devise to Chickasaw Lodge of Odd Fellows, "for the benefit of the widows and orphans," is for the widows and orphans of deceased members of that lodge, and is sufficiently definite to be sustained as a charity.

Cases cited and approved: Dickson v. Montgomery, 1 Swan, 366; Green v. Allen, 5 Hum., 204; Franklin v. Armfield, 2 Sneed, 347; Vidal v. Girard, 2 How., 192; Frierson v. General Assembly, 7 Heis., 694; State v. Smith, 16 Lea, 664; Gass v. Ross, 3 Sneed, 213.

2. INCORPORATION. *Delegated power.*

Chapter 69, Acts 1846, and Chapter 60, Acts 1847, authorizing the Grand Lodge I. O. O. F. to establish subordinate lodges, and providing that such lodges may hold title to property, did not delegate power to create corporations, and such lodges did not become corporations.

Cases cited and approved: State v. Armstrong, 3 Sneed, 634; Mayor v. Shelton, 1 Head, 24.

3. CHARITY. *Capacity to be trustee for.*

Such subordinate lodge, organized under a charter from the Grand Lodge, having a continuous personality and officers representing it, and being clothed by the Legislature with power to hold property, is such a legal person as is capable of holding and administering a trust germane to the purposes of the order.

4. CHARITABLE TRUST. *Right to question capacity of trustee.*

Where the charity is definite, heirs and devisees cannot question the legal capacity of the trustee to hold and administer the trust, but the State only can do so.

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Case cited and approved: Vidal v. Girard's Ex'rs, 2 How., 127.

Cited and distinguished: *In re* McGraw's Estate, 19 N. E. Reporter, 233.

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FROM SHELBY.

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Appeal from Chancery Court of Shelby County.  
B. M. ESTES, Ch.

HEISKELL & HEISKELL for Heiskell.

L. W. FINLAY for Chickasaw Lodge.

DICKINSON, Sp. J. This bill was filed by the executor of the will of Mrs. Addie B. Howell against Chickasaw Lodge, No. 8, Independent Order Odd Fellows, a devisee, and Eva Happoldt and others, who are residuary legatees under said will. The eleventh clause of the will is as follows: "I give the proceeds of my \$2,000 Union and Planters' Insurance Company stock to Chickasaw Lodge, No. 8, I. O. O. F., the dividends from said stock to be used by said lodge for the benefit of the widows and orphans."

It is conceded that this meant Planters' Insurance stock, the decedent owning at her death that amount of stock in said company.

It is insisted that this devise is void, on the grounds that the defendant lodge was not incorporated; that it could not, even if incorporated,

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hold any property except for strictly lodge purposes, such as providing for a hall and regalia, etc.; that it could not hold more than \$10,000 of property, conceding its lawful incorporation, and it already holds in excess of this sum; that the objects of the bounty, "widows and orphans," is too indefinite to be sustained, and that the residuary legatees are entitled to the stock. An additional question is raised by the lodge, insisting that only the State can question its powers, and that neither distributees nor residuary legatees can challenge its right to take the bequest, or set up any interest in it.

It is proven that the lodge holds property in excess of \$10,000 in value.

Trusts for charitable uses are favored by courts of equity in this State. *Dickson v. Montgomery*, 1 Swan, 366.

The general principles governing charities are well settled by our Courts, but their application must be made to the varying facts of each case; and therein lies the difficulty.

In *Green v. Allen*, 5 Hum., 204, the first case in which the question of charities came before our Court, the rule was thus stated:

"If the charity be created, either by devise or deed, it must be in favor of a person having sufficient capacity to take as devisee or donee; or, if it be to not such person, it must be definite in its object and lawful in its creation, and to be executed and regulated by trustees, before the

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Court of Chancery can, by virtue of its extraordinary jurisdiction, interfere in its execution."

In that case the bequest was to the "Tennessee Annual Conference of the Methodist Episcopal Church, for the benefit of institutions of learning under the superintendence of said Conference, and to the Missionary Society of the Methodist Episcopal Church, and to be otherwise disposed of as the Tennessee Annual Conference may deem best in their wisdom."

The Court held that this was "a general, indefinite purpose of charity," and that the Conference was not incorporated, and could not, therefore, "be looked upon as having any legal existence whatever," and that the proposed charity was not supported by trustees.

The principle established by this case is that where the purpose is too general and indefinite for a Chancellor to undertake in his discretion to carry it into effect, and there is no trustee capable of taking, who is charged with the application of the charity, it must fail. Both of these infirmities concurred in that case. If the charity had been clearly defined and the beneficiaries specifically designated, a new question, not involved in that decision—that of sustaining the charity by the appointment of trustees—would have arisen.

In the next case—that of *Dickson v. Montgomery*, 1 Swan, 348—the devise was to the Treasurer of an incorporated college, to be appropriated to home and foreign missions, and the education of indigent



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young men for the ministry, under the direction of the "Associate Reformed Synod of the South," an incorporated body.

Here the charity was too vague and uncertain for a Court of Chancery to have undertaken to clothe trustees with the power and discretion for its administration, but there was a legal person made trustee, who was capable of taking the trust, and the discretion as to the application of the bequest was lodged with such trustee, and the charity was sustained.

Thus, a charity which would have failed for indefiniteness, was saved because there was a trustee named capable of taking the trust. The converse of this proposition, viz., a definite object, but incapacity in person designated to take the trust, was not passed upon.

Judge Green, however, thus quotes, with approbation, from Story's Equity Jurisprudence, Section 1191: "Where a charity is definite in its objects, and lawful in its creation, and it is to be executed and regulated by trustees, whether they are private individuals or corporations, there the administration properly belongs to such trustees, and the King, as *pater patriæ*, has no general authority to regulate or control the administration of the funds. In all such cases, however, if there be any abuse or misuse of the funds by such trustees, the Court of Chancery will interpose, at the instance of the Attorney-General, or the parties in interest, to correct such abuse or misuse of the funds. But in

such cases the interposition of the Court is properly referable to its general jurisdiction as a Court of equity, to prevent abuses of trust, and not to any original right to direct the management of a charity or the conduct of the trustees. Indeed, if the trustees of the charity should grossly abuse their trust, a Court of equity may go the length of taking it away from them and commit the administration of the charity to other hands. But this is no more than the Court will do, in proper cases, for any gross abuse of other trusts."

It will be observed that this is predicated upon the fact that such charity is definite in its objects, and when this is the case the Court protects it from abuse. Protecting a charity from abuse, even to the extent of committing it to other trustees of its own appointment, requires the exercise, it would seem, of just as much discretion on the part of the Court in respect to the administration of the charity as would the original appointment of such trustees in the event that the trustee named in the will were legally incapable of taking the trust. If the charity were definite enough to be protected from abuse by the appointment of new trustees, it would appear to be sufficiently definite to be saved from failure by the appointment of a trustee in the first instance.

In the one instance the Court of Chancery acts upon the familiar doctrine that trusts are objects of its protection, while in the second instance the equally well-established equity principle, that a trust

otherwise valid shall not be permitted to fail for want of trustees, is invoked.

In *Franklin v. Armfield*, 2 Sneed, 347, Judge Marshall says: "Upon the jurisdiction of the Courts of Chancery in this State the cases of *Green v. Allen*, 5 Hum.; *Oakley v. Long*, 10 Id., 254; and *Dickson v. Montgomery*, 1 Swan, 361, have affirmatively settled that such jurisdiction exists in the Chancery Court in this State, in cases where the charity is created in favor of a "person having sufficient capacity to take as devisee or donee, or if it be not to such person, where it is definite in its object, lawful in its creation, and to be executed by trustees."

On page 348 it is manifest that Judge Marshall understands the words "person having sufficient capacity to take as devisee or donee," used by Judge Turley, as referring to the trustee and not to the beneficiaries under the charity, for he says, "By the will the testator appoints his brothers, James Franklin and William Franklin, trustees for the charity, and prescribes their duties. It is scarcely necessary to say that these persons are capable of taking as devisees in the language of Judge Turley." This construction of Judge Turley's language admits of no doubt, for he could not have referred to the beneficiaries, for if they were the devisees or donees referred to as capable of taking, then it would be no charity at all, but they would have a personal interest in and ownership of the fund. That in such case "devisee and

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donee" mean the trustee is evident from the construction put on the same words in *Vidal v. Girard*, 2 H., 192.

The rule, as stated by Judge Turley, provides for two classes of cases: where the trustee named has capacity to take; and second, where, though the trustees have not such capacity, nevertheless the object is definite and lawful, and is to be carried out by trustees. Under the first member of the rule the charity may be upheld by reason of a trustee capable of taking being interposed, though without such trustee it might fail because too indefinite for a Court of Chancery to undertake to apply it. Under the second member of the rule, the trust being definite and to be executed by trustees, a Court of Chancery can, for the reason that it is definite, and is to be executed by trustees who are always amenable to its authority, uphold it, and to this end it may remove the trustee.

In *Frierson v. General Assembly*, 7 Heisk., 694, it is stated that "the principles settled by our decisions are that where the charity is definite in its objects, is lawful, and is to be executed and regulated by trustees, who are appointed for the purpose, it will be upheld." The Court (page 693) further says, "It may be considered now as settled in this State, and we believe in most of the States of the Union that the jurisdiction rests, mainly if not entirely, upon the ordinary powers of our Courts of Chancery as to the administration and enforcement of trusts."

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Where there is no trustee clothed with discretion in the distribution of the charity, who is capable of taking, and the objects are indefinite, the charity must fail, but where it is definite, and is to be administered by trustees, then there is no reason in law or public policy why it should fail.

Perry, in his work on Trusts, Section 722, says: "If a donor makes a gift in trust for a particular charitable purpose, as to establish a particular school, hospital, asylum, or other charitable institutions, and appoints no trustee; or the trustee appointed by him is incapable of taking the gift, and of acting in that behalf; or if the trustee dies before the testator, or declines to act; or if trustees are named or appointed who are not in *esse*, but are to come into existence thereafter, as by an act of incorporation, courts of equity, in the exercise of their ordinary jurisdiction, can establish the charity; for it is their invariable practice not to allow a legal and valid trust to fail for want of a trustee. Therefore Courts will appoint trustees in such cases to take up and carry out the clear purposes of the donor, or they will order the heir or legal representative to hold the fund upon the declared trust until trustees can be appointed to execute the trust as contemplated. In exercising this jurisdiction Courts are called upon to exercise no extraordinary prerogative powers."

In *State v. Smith*, 16 Lea, 664, where the devise was to trustees to establish "a college of learning," the trust was not only sustained, but the

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Court undertook to supervise the location and plans of building and the scheme for the conduct of the college.

The following principles are settled in Tennessee:

*First*—That trusts for charitable uses should be favored by courts of equity.

*Second*—That where the object of the charity is definite, and it is to be administered by trustees, it will be sustained. .

*Third*—That although the objects may be too indefinite for a court of chancery to undertake to administer it, yet if a trustee capable of taking the trust be named and clothed with the necessary powers and discretion for carrying out the charity, it will be upheld.

It has, however, never been adjudicated in this State that a court of equity, in order to sustain a charity, though it be sufficiently definite, will appoint a trustee in cases where none are named in the instrument creating the charity, or where the trustee named is incapable of taking; and, as will further appear, this question does not arise in this case.

Let us now apply the principles stated to the present case.

It is said that the designation of the beneficiaries is too indefinite, and that therefore the devise must fail.

The language of the will is: "The dividends from said stock to be used by said lodge for the benefit of the widows and orphans."

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It is in proof that there were certain widows and orphans of former members of this lodge in being at the time the will went into effect, and their names are set out in the record. We do not consider this material, as it was clearly not the intention of the testatrix to give any particular persons a special interest in the fund. The fund was not to be divided, but the principal was to be kept intact as a trust fund, and the interest was to be used from time to time for the benefit of the widows and orphans of that lodge, the class to continue though individuals might die and new ones come in. It is said that no special widows and orphans are meant, and that it means widows and orphans generally. The will says "the" widows and orphans, and uses the expression in connection with that lodge. It is a matter of general knowledge that one of the objects of this order is to take care of the widows and orphans of its deceased members. It is in proof that this fact was known to the testatrix. The constitution of the order is in evidence, and shows that the care of widows and orphans is one of its special functions.

The purpose of a bequest to an order of this kind, for the widows and orphans, admits of no doubt as to the beneficiaries intended. That it is a fluctuating class can make no difference.

As said by Judge Green in *Dickson v. Montgomery*, 1 Swan, 369, and approved in *Frierson v. General Assembly*, 7 Heis., 706, "it is of the very

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nature of a charity that the individual beneficiaries are unknown."

Judge Marshall, in *Franklin v. Armfield*, 2 Sneed, 350, says: "It certainly has been said that 'uncertainty of individual object is a characteristic of charity,' and it has been said that this 'uncertainty is indispensable to all charities,' and 'if any one has a right to claim by law, it ceases to be a charity.'"

In *Vidal v. Girard* the devise was for the education of poor children in the native city of the testator.

In *Gass v. Ross*, 3 Sneed, 213, a bequest of a fund to be invested in stocks, the dividends to be applied to the education of the children in a designated school district in the county forever, was held to be sufficiently definite.

Perry, in his work on Trusts, Section 710, says: "In order that there may be a good trust for a charitable use, there must always be some public benefit open to an indefinite and vague number; that is, the persons to be benefited must be vague, uncertain, and indefinite until they are selected or appointed to be the particular beneficiaries of the trust for the time being."

In *State v. Smith*, 16 Lea, 664, the devise was "to the trustees of the free schools of Shelby County, Tennessee, and their successors in office forever, for the purpose of erecting a college of learning," and to the Chairman of the County Court of Shelby County, Tennessee, "to be applied



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for the education of the poor and orphan white children in the first district of said county." Both of these charities were sustained.

We hold that the beneficiaries under Mrs. Howell's will are definitely indicated, and that the terms of the bequest, viz., "the widows and orphans," in the connection used mean those of Chickasaw Lodge, and that they embrace a certain and continuing class always capable of identification.

It is next insisted that the devise must fail because the Chickasaw Lodge is not incorporated, and that no trustee capable of taking the property is named. It is settled in this State that a voluntary unincorporated association cannot take such a devise, except it be for church purposes. *Reeves v. Reeves*, 5 Lea, 646.

By an Act passed in 1846 (Chapter 69) "the Grand Lodge of the Independent Order of Odd Fellows of the State of Tennessee" was incorporated with power "to acquire, hold, possess, use, occupy, and enjoy real and personal estate to the amount of \$20,000, and to sell and convey or otherwise dispose of the same under by-laws, rules, and regulations of said lodge, and to be competent to contract and be contracted with, to sue and be sued, plead and be impleaded," etc.

By Chapter 60, Acts 1847, the former Act was amended so "that whenever said Grand Lodge shall establish or charter a subordinate lodge, the said subordinate lodge is hereby invested with the separate right to an amount of real and personal

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property not exceeding the sum of \$10,000, to the same extent and under the guards and restrictions of the aforesaid Act of 19th of January, 1846."

The third section of the amendatory act provides that: "Whenever the authority establishing said subordinate lodge shall be withdrawn and the separate existence of said subordinate lodge be destroyed, the property of said lodge shall be placed in the hands of a trustee appointed by the grand lodge to pay the debts and liabilities of said subordinate lodge, and the residue of the real estate, if there be any, to be applied by the trustee as may be prescribed by the by-laws of said subordinate lodge; *provided*, the benefit of this act shall extend to lodges already established as well as to those to be created."

It is insisted that the defendant lodge could not, by virtue of these acts, become a corporation, because the Legislature cannot delegate the power to create corporations, and that this is the effect of the foregoing acts, if it be insisted that their purpose was to make subordinate lodges legal persons.

In *State v. Armstrong*, 3 Sneed, 634—where the Act of 1856, Chapter 254, which conferred upon the Courts the power to create corporations and invest them with such rights as were not incompatible with the Constitution and laws, was in question—Judge McKinney held that the power to create corporations was, by the Constitution, vested exclusively in the Legislature, and that it could not be delegated.

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In *Mayor, etc., v. Shelton*, 1 Head, 24, the Act of 1849, Chapter 17, which authorized County Courts, upon certain conditions, to create town corporations, was sustained. The distinction between this act and the one declared void in *State v. Armstrong* is clearly stated. Under the former, legislative discretion to confer powers was attempted to be delegated to the Courts, while under the latter act, all the powers, privileges, and immunities were fixed by the Legislature, and nothing was left to the County Court but to record the petition and prescribe the limits of the town.

The acts chartering the Grand Lodge of the State do not delegate to it the authority to confer any powers upon subordinate lodges. The legislative discretion in this respect is not parted with, but the power with which such lodges is to be clothed is distinctly defined in the act. There can be no distinction drawn between these acts in this respect, and the one sustained in *Mayor v. Shelton*, except that, under the former, the association of individuals, upon whom the power under the legislative enactment devolved, was organized by the grand lodge, while under the latter it was effected by the recording act of the County Court. In neither case was any power, right, liability, or immunity imparted, beyond what the legislative will had expressly passed upon and sanctioned in advance.

We know of no principle which makes such investiture of power in the Grand Lodge, as is given

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by these acts void, or against public policy. When these acts were passed there was no general law by which the right to hold property might be acquired by an association, and it would have been highly inconvenient to the Order and harrassing to the Legislature if a separate act had been necessary every time a subordinate lodge was created.

The purposes were benevolent, and not for private gain. The life and harmony of the Order depended upon judicious care in constituting subordinate lodges, and there was, in the nature of things, no probability of any abuse from the provision for clothing with the limited rights designated such branches as might be established.

The maintenance of the constitutionality of these laws, and the validity of the acts done under them, does not establish that the defendant lodge is a corporation. No certain form is necessary to a grant of corporate franchises, nor is the use of the words "incorporate" indispensable. The real character and attributes must be looked at to determine whether there was a purpose to create a corporation. Morawitz, Section 18.

There is nothing in these acts indicating any such intent. The only power conferred is the right to hold a certain amount of property.

No right is given to sue or be sued, to contract, or have a corporate seal. No provision is made by law for the control of its affairs. The characteristics and attributes ordinarily belonging to corporations are all wanting. Charters of incor-

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poration are usually for a fixed period, or determinable at the legislative will. The defendant holds its life at the will of the Grand Lodge.

The intention of the Legislature to confer corporate franchises is essential to an act of incorporation, and no presumption should be allowed in favor of the grant. Morawitz, Section 19.

The theory that subordinate lodges are independent corporations is wholly inconsistent with the system of government of such Orders. The reserved power to destroy them negatives the idea that the Grand Lodge sought to have them made legal entities with a vital system of their own.

It is evident that the purpose of those Acts was not to create corporations out of subordinate lodges, but simply to clothe them with the one power of holding property which was necessary for the establishment and operation of local branches of the Order. If the purpose of the Acts was to create corporations, then their constitutionality would be involved upon the point of lodging with an Order over which the State has no control powers such as are ordinarily conferred only on Courts and public officers. As we have construed them this question does not arise.

While the devisee named is not a corporation, yet it is clothed by the State with the power to hold property. It exercises such power under legislative sanction, and its right to do so cannot be questioned, except upon *quo warranto* proceedings at the instance of the Attorney-General. While it

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is not a corporation, yet it is a society organized under a charter from the Grand Lodge, having a continuous personality, notwithstanding changes of individual membership, and being represented by officers authorized to act for and bind the association. It is different from a merely voluntary association, which may at any time disappear from existence by the inaction of individual members. It is a *quasi* private corporation, and to this extent it is recognized as a legal person by the Legislature, which has clothed it in its corporate capacity with powers which only a legal person can exercise. It is impleaded in this case as a legal person. The Courts can reach it as an entity, and can control it in the administration of this trust.

We hold, therefore, that the lodge has sufficient capacity to take this fund, and that it is a proper trustee to administer it for the purposes specified, because those purposes are germane to the objects of its existence.

But it is said that the lodge, even if incorporated, cannot, under its constituting instrument, hold more than ten thousand dollars' worth of property, and that it already holds more than that amount.

In the construction we have given to the devise it is not to the lodge for its own use, but in trust, and therefore the limitation does not necessarily apply in this case. But if it did, we do not think that this question can be raised by the parties litigant.

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There is a distinction between the case where a corporation has received and is holding property in excess of the limitation of its charter and the case where its rights have not vested and it is not in possession. In the first case no one but the State can raise the question or enforce a forfeiture. *Barrow v. Turnpike Company*, 9 Hum., 307.

In the second case, if there be a devise direct to the corporation for its own use and benefit, then the heirs or residuary legatees may raise the question, because the gift would be void, the same as if made to any impossible person, and the property would go the same as if the bequest had not been made. Those in whom the right to it would have vested, if it had not been disposed of at all, have a perfect right to assert their claims against such corporation. *In re McGraw's Estate*, 19 N. E. Reporter, 233.

In that case the bequest was a gift to Cornell University for its own use, and not in trust for any charity, and the donee, already possessing more than its charter permitted, the devise was held void, and the right of the heirs and next of kin to contest the validity of the gift on this ground, and claim the property, was sustained in a very able opinion by Judge Peckham. That case, though cited as conclusive as to the one under consideration, itself sets forth, in clear terms, the distinction between the two. As stated, the McGraw devise was a gift direct to a corporation which

could not take. This is a bequest for a definite charity, made to a devisee entrusted with its administration. The devise is not void, because it is for a definite charity. It is valid, and the heirs and next of kin have no interest in it, and cannot question the capacity of the trustee named.

Judge Peckham, on page 252, says:

“In the case of *Vidal v. Girard's Ex'rs*, 2 How., 127, the trusts created by the will of Stephen Girard were held valid, and the Court said that in such a case, if the corporation were incompetent to execute them, the heirs could not take advantage of such a fact, as that could only be done by the State by *quo warranto* or other judicial proceeding. This is upon the ground that the trust was a valid trust; and if so, and the corporation, as such, had no power to execute it, the trust did not, for that reason, fail; but upon the failure of the corporation for lack of power to execute it, a court of equity would appoint a new trustee. Of course the heirs had no interest in the question when once the trust was declared valid, whether the corporation was exceeding its powers in taking upon itself the execution of the trust or not. They had no title to or any further interest in the property.”

In the construction we have put upon this bequest the parties who are making the contest in this case have no interest in or right to the property, and they cannot question the right of the



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*Heiskell v. Chickasaw Lodge.*

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trustee named to hold, the trust fund any more than any stranger to the will.

This bequest being for a definite charity, to be carried out by a trustee capable of taking the property, is valid. The decree of the Chancellor is affirmed.

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State v. Matthews.

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## STATE v. MATHEWS.

(Jackson. May 16, 1889.)

LARCENY. *What is. Where triable.*

Larceny is consummated in Tennessee, where goods stolen in another State are carried by the thief,\* *animo furandi*, into this State; and the offense is triable in any county into which the goods are brought—each removal being a continuance of the trespass, and, in legal contemplation, a new caption and asportation.

Code construed: § 5805 (M. & V.), § 4977 (T. & S.).

Cases cited and approved: *Henry v. State*, 7 Cold., 334; *State v. Margerum*, 9 Bax., 362; 3 Stewart, 123; 39 Ala., 654; 12 Mo., 453; 11 Wend., 129; 40 Ala., 44; 24 Mich., 166.

Cited and distinguished: *Simpson v. State*, 4 Hum., 456.

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FROM SHELBY.

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Appeal in error from Criminal Court of Shelby County. J. J. DUBOSE, J.

Attorney-General PICKLE and GEO. B. PETERS for State.

No counsel marked for Defendant.

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\* A person, other than the thief, bringing property stolen in another State into this State, knowing it to be stolen, is punishable under Act 1875, Ch. 31. (Code, §§ 5462-5464 (M. & V.).)—REPORTER.

LURTON, J. The indictment charges that the defendant feloniously stole certain property in the State of Mississippi, with the intent to bring it into Tennessee, and then brought it, in pursuance of his felonious design, into Shelby County, in this State, and there stole, took, and carried away the same, thereby being guilty of larceny in the county of Shelby and State of Tennessee. Upon motion the indictment was quashed, His Honor, the Criminal Judge, being of opinion that the facts charged did not constitute a larceny committed in this State. In *Simpson v. State*, 4 Hum., 456, Judge Turley said that an indictment for larceny would not lie where the property is stolen in another State and brought by the thief into this, and who is here found in possession. The case was decided, however, upon another point, and what was said upon the matter now involved was not necessary to a decision of the case.

Section 4977 of the Code, subsequently enacted, reads as follows: "Where property is stolen in another State and brought into this State, the jurisdiction is in any county into which the property is brought." This section is found in the chapter relating to the local jurisdiction of offenses.

It is followed by a section prescribing that "where property is stolen in one county and brought into another, the jurisdiction is in either county."

Both of the quoted sections are taken from the Code of Alabama, and the first has there been

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State v. Matthews.

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construed as constituting the crime of larceny, in that State, of goods stolen in another. *State v. Levy*, 3 Stewart, 123; *Alsey v. State*, 39 Ala., 654.

We are of opinion that under this section the indictment will lie. It was obviously intended to make the thief who brings stolen property into this State, and is here found in the fraudulent and felonious possession, appropriating it to his own use, guilty of the crime of larceny, upon such facts, in this State. There can be no doubt of the power of the Legislature to pass such a law. As remarked by the Supreme Court of Missouri, "the Legislature punishes the offense committed in this State by bringing the stolen property into it, and in doing so they merely codify a settled principle of the common law applicable to different counties, and extend it here to neighboring States and foreign countries." 12 Missouri, 453.

Such statutes have been held valid whenever questioned. *People v. Bush*, 11 Wend., 129; *Alsey v. State*, 39 Ala., 664; *Laraul v. State*, 40 Ala., 44; *People v. Williams*, 24 Mich., 166.

The Act proceeds upon the well understood principle that the continued possession of stolen property, *animo furandi*, is, at every step, a new caption and asportation. This view has always been held at common law; and that therefore the stealing of property in one county of the State and taking it into another was larceny in the latter county. Every moment's possession by the

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State v. Matthews.

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thief is a continuance of the trespass, and amounts, in legal contemplation, to a new caption and asportation. *Henry v. State*, 7 Cold., 334; *State v. Margerum*, 9 Bax., 362.

This principle is extended by the statute to larcenies begun in another State.

The judgment will be reversed, and case remanded for further proceedings.

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State v. Wilson.

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STATE v. WILSON.

(Jackson. May 16, 1889.)

1. JUSTICES OF THE PEACE. *Authority to administer oath to surety for appeal.*

Justices of the Peace, being required by statute to take "bond with good security" from parties prosecuting appeals from their judgments to the Circuit Courts, are thereby invested with implied authority to administer oaths to proposed sureties for such appeals, and to examine them touching their solvency.

Code construed: § 3857 (M. & V.); § 3141 (T. & S.).

2. PERJURY. *Authorized oath.*

Such oath is material, and required or authorized by law, within the meaning of our statute defining perjury to be willful and corrupt swearing in regard to a "material matter upon any oath \* \* required or authorized by law."

Code construed: § 5587 (M. & V.); § 4793 (T. & S.).

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FROM SHELBY.

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Appeal in error from Criminal Court of Shelby County. J. J. DUBOSE, J.

Attorney-General PICKLE for State.

GANTT & PATTERSON for Wilson.

CALDWELL, J. The defendant was indicted in the Criminal Court of Shelby County for perjury.

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State v. Wilson.

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On motion, the indictment was quashed, and the State has appealed in error.

It is charged in the indictment that John Walsh recovered a judgment against E. W. Wilson for \$159 before J. P. Young, a Justice of the Peace for Shelby County, on the 20th of October, 1888; that the defendant therein prayed an appeal from that judgment to the Circuit Court, which appeal was granted on condition that he would execute an appeal bond, as required by law; that on the 22d of October, 1888, and within the time allowed by statute for the execution of appeal bond, the defendant in the present case appeared before the said Justice of the Peace, and offered himself as surety on the required bond, whereupon, to test the solvency and sufficiency of said proposed surety, the said Justice of the Peace administered to him, the said Frank Wilson, an oath touching the material question of his ownership of property and financial condition; that he, the said Frank Wilson, then and there willfully, maliciously, knowingly, corruptly, and feloniously did swear falsely that he owned, etc., whereby he committed willful, deliberate, and corrupt false swearing and perjury..

The ground of the motion to quash is that there was *no authority* in the Justice of the Peace to *administer the oath*, in the taking or making of which the defendant is charged with having sworn falsely; that there is no law authorizing or requiring a Justice of the Peace to administer an oath

to a person tendered as surety on a bond for an appeal from the judgment of such Justice to the Circuit Court, and that therefore there is no charge of legal perjury.

The crime of perjury, "as described in the common law, is committed when a *lawful oath* is administered, in some *judicial proceeding* or *due course of justice*, to a person who *swears willfully, absolutely, and falsely* in a matter material to the issue or point in question." 3 Greenleaf's Ev., Sec. 188; 2 Bishop's Cr. L., Sec. 980; Wharton's Cr. L. (3d Ed.), p. 746.

By our statute, "Any person who willfully and corruptly swears or affirms falsely in any material matter, upon any oath or affirmation *required or authorized by law*, is guilty of perjury." Code (M. & V.) § 5587.

To constitute the offense under either of these definitions, it is indispensable that the acting official have jurisdiction to administer the oath; and whether that jurisdiction existed in the case averred in the indictment is the question we have for decision.

It is conceded, of course, that a Justice of the Peace has full legal authority to administer an oath in the course of judicial proceedings properly pending before him, and in many other instances where the authority is expressly conferred by statute; yet it is denied that such authority extends to the case made in the indictment.

The matter of litigation alleged, so far as it



involved the liability of the defendant therein for the debt sued on, had been determined, and was no longer pending; the Justice had nothing further to do or consider in that regard when the oath in question was administered; hence, that oath cannot be placed upon the same footing as one administered in the course of judicial proceeding with respect to the matter in controversy or the issue joined.

Confessedly, the case had passed that stage; and the authority for administering that oath must be found, if found at all, elsewhere than in the provision of the law which requires the Justice to qualify the witnesses testifying on the trial of the case.

The litigation having passed into judgment, the unsuccessful party asked for an appeal to the Circuit Court. It then became the duty of the Justice to see that the appellant gave an appeal "bond with good security." That duty was devolved upon him by statute, whose terms are mandatory. Code (M. & V.) § 3857. The *means* by which he shall determine when the required "good security" has been tendered, however, are not prescribed by that or any other statute, nor by any decision. That is a matter left to his own fair and honest judgment, and he must decide it for himself, resorting to all available sources of information necessary to a correct conclusion.

It is not required or expected that the Justice shall reject every proposed surety whose financial condition he does not know of his own knowledge. On the contrary, it is both expected and required that he will avail himself of other means of in-

formation in every such case, and that he will fairly and honestly, under his oath of office, investigate the whole question of the sufficiency or insufficiency of such surety. In this investigation it may become necessary for him to examine such proposed surety and his neighbors, or others who know him, under oath. If so, then it becomes his duty to administer the oath and so take their statements as evidence upon the question in hand.

Common experience and observation teach that, in some instances, it will be practically impossible for the Justice to acquire all the information requisite to a fair, honest, and intelligent discharge of this official duty, within the limited time allowed by law for the execution of an appeal bond, without qualifying the person proposing to become surety and others, and examining them under oath.

Though it is not allowable that he shall shift responsibility from himself by merely taking the sworn statement of others, that is one source of information to which he *may* resort, under the law, in making up his judgment upon the question in hand.

Therefore we are of the opinion, and we hold, that the imposition of the duty of taking "bond with good security," by implication carries with it *the authority to administer an oath*, and take sworn statements from the proposed surety and others touching his financial condition.

In this way the oath administered to the defendant was "authorized by law."

Let the judgment be reversed, and the case remanded.

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 Railroad v. Greer.
 

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## RAILROAD v. GREER.

(Jackson. May 28, 1889.)

1. AGENT. *Negligence. Liability to principal. Intervening cause.*

An agent may be liable to his principal for loss occasioned by his misconduct, although such misconduct is not the direct cause of the loss, and the loss was immediately attributable to the intervention of third parties.

## 2. NEGLIGENCE OF OTHER SERVANTS THE DIRECT CAUSE.

One may employ a servant for the express purpose of protecting himself from loss that may arise from negligence of his other servants, and if such employe negligently and in violation of his duty puts his principal in an attitude whereby loss occurs through negligence of his other servants, and such loss could not have arisen had such duty been performed, then such employe is liable to his employer for such loss.

3. INSOLVENCY OF AGENT. *Quia timet.*

If the employer is being sued by a third party, who, by the misconduct of his employe, was put in a position where he was injured by the negligence of the employer's other servants, and the putting of the person injured in such position created such relations between him and the employer as would make the employer liable for such injuries, and if the derelict employe, being insolvent, is about to collect of his employer a judgment, then the collection of so much of the judgment as equals the amount claimed by the injured person of the employer will be enjoined until the liability of the employer and the consequent liability of the employe be ascertained.

Cases cited and approved: *Parker v. Britt*, 4 Heis., 249; *Baird v. Goodrich*, 5 Heis., 20; *Miller v. Speed*, 9 Heis., 200; *Henry v. Compton*, 2 Head, 249.

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 FROM SHELBY.
 

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Appeal from Chancery Court of Shelby County.  
B. M. ESTES, Ch.

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Railroad v. Greer.

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POSTON & POSTON for Railroad.

PITTS, HAYS & MEEKS for Greer.

J. M. DICKINSON, Sp. J. The bill charges that defendant Greer recovered a judgment in this Court for eight thousand dollars, for personal injuries, against complainant, the Memphis and Charleston Railroad Company, and that defendant is about to enforce the collection of the same; that Greer was, at the time of the injury for which he recovered said judgment, in the employ of complainant as a freight conductor in charge of a freight train; that there was, at this time, a rule of said company in force prohibiting any person from riding on its freight trains, unless by special permit from the superintendent or train dispatcher, and that this rule was known to Greer; and that it was his duty, as conductor, to enforce it; that at the time Greer was injured, one Powell, a kinsman of Greer, was riding on the freight train of which Greer was conductor, without the requisite permit and in violation of said rule, and with Greer's consent; and that Greer knew he was, in permitting this, violating the rule of the company, which it was his duty to enforce; that in an accident which happened to said train Powell was injured; and that he had sued the complainant in the courts of Mississippi, for said injuries, in the sum of five thousand dollars; and that

the suit was pending at the time of filing this bill.

The bill further alleges that the defendant is wholly insolvent, and prays that he be enjoined from collecting five thousand dollars. of said judgment, until the termination of the Powell case, and that, in the event judgment should be recovered by Powell, it shall be satisfied out of the five thousand dollars impounded.

Complainant tendered with its bill the excess of the judgment, with interest and costs, in favor of Greer, over five thousand dollars, and the Chancellor granted a fiat for the injunction, conditioned upon the execution of a bond in the penalty of ten thousand dollars and the payment into Court of said excess; all of which was done, and the injunction issued.

Defendant demurred, and assigned eleven grounds.

By consent of parties the East Tennessee, Virginia, and Georgia Railroad Company was allowed to file an amended and supplemental bill, which set up that it was the lessee of complainant's road and was operating the same, and was the real party in interest in respect of all matters involved in the litigation. It also repeated, in substance, the allegations of the original bill.

A new injunction bond was given, and it was agreed that the injunction already executed might remain in force. The Defendant Greer was paid the excess over the five thousand dollars; and upon the execution by him of a refunding bond in the

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Railroad v. Greer.

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penalty of ten thousand dollars, complainant was ordered by the Court to pay him the remaining five thousand dollars, which was done. Defendant relied upon the demurrer filed to the original bill, and assigned three additional grounds.

The cause was heard upon demurrer; and the Chancellor dismissed the bill, and decreed that the refunding bond be canceled, and from this decree complainant appealed.

The grounds of demurrer, fourteen in number, are too numerous to be set forth in detail, and, besides, the same question is presented under separate assignments in but slightly varying aspects. Summarized and grouped, they present the following propositions, in substance:

*First.*—Whether the bill can be maintained under the head of equitable set-off, because of the want of any present subsisting demand against the defendant; the demand set up in the bill being a mere possibility, a contingent liability, that may never be fixed.

*Second.*—As the bill is predicated upon a liability to Powell for a wrong, this, by implication, is an admission that complainant has been guilty of negligence; and therefore it should not be permitted to maintain its bill to make defendant liable to it for losses which it has sustained by its own wrongful conduct.

*Third.*—That complainant cannot make defendant answerable to it for such losses incurred by injuries to Powell, unless it alleges that the injuries

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Railroad v. Greer.

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occurred through the default of defendant as a proximate cause, and that the same was in nowise occasioned by any negligence of complainant, either as a proximate or a concurrent cause.

*Fourth.*—That though it be alleged that defendant violated his duty, yet this was not the cause of the injury, but that some other independent act of complainant was the proximate cause, and that therefore complainant, being itself a wrong-doer, cannot call upon defendant for contribution.

The theory of the bill is that one of the duties of defendant's employment was to prevent persons from riding on the train of which he was in charge, and that, in violation of his obligations to the company, defendant permitted Powell to be in the position where he was injured, and thus created relations between Powell and complainant by which complainant might become liable to him. The contention is that, no matter what might have happened to the train, no liability could have arisen to Powell but for the wrongful and conscious violation by defendant of a rule which was intended to protect the company from exactly such responsibility, and for the enforcement of which, as one of his express duties, he was employed.

Story on Agency, Sec. 217*c*, says: "Whenever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority or by positive misconduct, or by mere negligence or omission in the proper functions of his agency, or in any other manner, and any loss or

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damage thereby falls on his principal, he is responsible therefor, and must make a full indemnity therefor. In such case it is wholly immaterial whether the loss or damage be direct to the property of the principal, or whether it arises from the compensation or reparation which he has been obliged to make to third persons in discharge of his liability to them for the acts or omissions of his agents. The loss or damage need not be directly or immediately caused by the act which is done or omitted to be done. It will be sufficient if it be fairly attributable to it as a natural result or just consequence."

The above, in substance, is quoted and approved in *Walker v. Walker*, 5 Heis., 427.

The same author, after citing cases where the agent was held liable for violation of duty, although other causes intervened to produce the injury, says, Sec. 219: "In all these cases, although the misconduct or negligence of the agent is not the direct and immediate cause of the accident or loss, yet it is held to be sufficiently proximate to entitle the principal to recover for the loss or damage, for otherwise the principal would be without remedy for such loss or damage, since the same objection would apply in almost all cases of this sort."

Wharton on Agency, Sec. 253, says: "If the loss was immediately attributable to *casus*, or the intervention of third parties, this constitutes no defense, if the principal was exposed to such by



the misconduct of the agent. The supervening loss must in some way be connected with the fault either as causing the loss as a cause or as determining the incidence of some other cause of loss."

Sutherland on Damages, Vol. III., page 8, says, in regard to liability of agents for violation of instructions of principal, as follows: "The instructions may relate to measures deemed expedient by the principal to secure himself against a contingent or possible loss. If these instructions are disregarded the agent will not be heard to say that he is not liable by reason of the uncertainty of the loss if it happens, for it is a loss in contemplation of the parties; the instructions were intended to make exemption from such possible loss certain. After the disregard of such instructions the loss, when it occurs, is morally the direct consequence of the agent's breach of duty, whatever may be the immediate physical cause."

It is said that this principle cannot be applied in this case, because Powell's injury must have occurred through some negligence of complainant, for otherwise complainant could not be liable to him, and that such negligence, and not the act of Greer, was the proximate cause; and, moreover, Greer, though in default himself, and contributing to the loss of complainant, cannot be held liable to complainant, where its negligence was concurrent and contributed to the injury.

Railroad companies operate trains by subordinate

officers and servants. Though there may be no negligence on the part of its controlling officers, it is, nevertheless, answerable to injured parties for the negligence of its subordinate officers and servants under the doctrine of *respondeat superior*, just the same as if it were an individual, and had, as such, been personally guilty of the negligence complained of.

Freight trains are not adapted to the carrying of persons, either with speed, safety, or convenience. The hazard is far greater upon them than upon passenger trains, which are specially designed and operated for transporting persons. This division, in the manner of performing railway service, is based upon practical experience which has demonstrated that it is in the interest both of the carrier and the general public. It is general in all countries where railways have reached an advanced stage of development. Complainant has limited the use of its freight trains, except in cases where special permit is given, to the transportation for which they are designed, and in view of the greater risk to life and limb upon such trains, and the consequent liability, it imposed upon defendant the duty of excluding persons from the train of which he was conductor, and of preventing the consummation of the contractual relation of common carrier with its attendant liability. The risks intended to be guarded against may have been, and most probably were, those which might result from the negligence of its own servants.

If, being aware of these hazards, arising from the necessary employment of a great number of servants, and wishing to guard against them it contracted with defendant, and paid him to perform a duty which would have effectually protected complainant from any liability to Greer, and if defendant may, as is contended, willfully violate his contract and annul with impunity the obligations of his employment, and create for complainant the very contractual relation he agreed to prevent, then a case would be presented of a wrong without a remedy, a breach of contract without liability, and an abortive though careful effort to guard against danger, with no power to avoid the consummation of a contract entailing liability and loss, and no redress for the dereliction of the agent who, in violation of his duty, created the relation from which the contract followed as a direct legal consequence.

The conductor, in violation of his duty, placed Powell in the position where he was injured, and if such injury was the result of an accident caused by the negligence of complainant's other servants, he thus, by defendant's act, acquired the right to recover damages from complainant. The negligence of the company's other servants in causing the accident would not have injured Powell but for the misconduct of defendant. But for the act of defendant the train might have been annihilated through the negligence of complainant's other servants, and yet no injury could have been sustained

by Powell. While Powell has no right of action against defendant, and as between Powell and complainant the negligence of complainant was the proximate cause of the injury, yet as between complainant and defendant the wrongful act of defendant was the proximate and efficient cause of loss to complainant, should it have to pay Powell. As this was in violation of his duty to his principal, defendant should answer for the loss sustained. Such injuries and losses were within the contemplation of his contract, and the rule which was known to him put him fully on his guard. He assumed the risk himself when he violated it. He cannot admit that he has breached his contract in failing to protect complainant from losses occasioned by the negligence of its other servants, which he might have done by the performance of a simple duty, but deny that he can be held liable, on the ground that the negligence of such servants as between complainant and Powell is in law imputable to complainant.

The obligation imposed by a rule of law upon complainant as to third parties has nothing to do with the contractual responsibility of defendant. The effect of such a rule as is contended for would be to deprive a principal absolutely of the benefit of a contract having for its purpose the employment of an agent to protect him, by guarding him in a way fully within his power, against the establishment of conditions, which bring strangers within the radius of injuries that may

accrue through the negligence of his other servants.

It is further argued that, as both complainant and defendant were neglectful, complainant cannot sustain this action, because there can be no contribution between wrongdoers. They do not occupy this relation to each other, for, if they did, then Powell would have had a right of action against Greer, which he did not, as Greer had done him no wrong. He, by virtue of his agency, put him under the protection of his principal, with its legal consequences, and that is what is now complained of. It is not contribution but indemnity that is asked for, from an agent, for a loss occasioned by his misconduct. The action is for a breach of contract, and not against a co-tort-feasor.

The Chancellor dismissed the bill on the ground that it could not be sustained under any head of equity jurisdiction except that of equitable set-off, and that the essential element of a present, subsisting claim is wanting, and hence complainant has no remedy, however meritorious his right may eventually turn out to be. It is true that complainant has no present, fixed demand, and it may defeat Powell, and hence never have one; but if the allegations in the bill be true as to the contract with defendant, and his violation of duty, then it is manifest that complainant, in litigating the claim of Powell in Mississippi, is making a contest in the interest of defendant. The action of complainant, which redounds to the benefit of

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defendant, is urged as a ground for destroying the only means of indemnity left to complainant. The allegation in the bill, that the right of Powell is denied, and that it is being and will be contested, is in the interest of this defendant; for, if complainant had admitted unconditionally in this bill its liability to Powell, then such admission might have been used in the suit pending in Mississippi.

It appears, therefore, in this case, that while complainant might have paid the claim of Powell, and thus have acquired such a subsisting right against defendant as would have justified impounding the fund until it could have been adjudicated, it has pursued a course which is far more to the interest of defendant, and is making a fight in his behalf.

The peculiar relations between the parties, growing out of the facts surrounding the demand, might justify the application of the doctrine of equitable set-off, for, as stated in *Parker v. Britt*, 4 Heis., 249, "courts of equity will extend the doctrine of set-off in all cases where peculiar equities intervene between the parties."

The bill will lie as a *quia timet* bill, to prevent irreparable injury, on account of the insolvency of defendant. Such a bill was sustained when it was brought by a vendee to enjoin the sole devisee of his vendor, from disposing of the devised property, upon the allegation that he had been sued for the land purchased, and might lose it by a paramount title, and that if the property should be aliened

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he would have no remedy on his warranty, and thus would suffer irreparable injury. *Baird v. Goodrich*, 5 Heis., 20. In that case the land had not been lost, and might never be, but the bill was sustained as a *quia timet* bill, notwithstanding the right to sue at law upon the covenant of seizin was unembarrassed. It has been held that a surety, when his principal is insolvent, may proceed against him before paying the debt. *Miller v. Speed*, 9 Heis., 200 and 201, and cases there cited. *Henry v. Compton*, 2 Head, 549. And so the doctrine is stated in Pomeroy's Equity Jurisprudence, Section 1417.

Complainant is not a surety of defendant, and there is no privity between defendant and Powell, and yet it is answering for the default of defendant—a default in respect of which defendant is primarily liable to it the same as he would be under a contract of suretyship. As between them their obligation stands on as high ground, and rights under it should be protected to the same extent. It would be contrary to natural justice to permit Greer, who is insolvent, to collect his entire judgment from defendant, and make way with the money, and, by the interposition of such defenses, defeat the right, and leave complainant to pay Powell for an injury occasioned by Greer's wrongful act, and in violation of his contract, which was to protect complainant against the possibility of answering for such accidents to passengers. Defendant has collected all of the money, and has given a refund-

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ing bond for \$10,000, and it is right that it should remain in force.

The decree of the Chancellor is reversed, the demurrer is overruled, the refunding bond remains in full force and effect, and the cause is remanded for further proceedings.



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Dyer County v. Railroad.

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## DYER COUNTY v. RAILROAD.

(Jackson. May 28, 1889.)

1. RAILROADS. *Repairs at crossings.*

Where a railroad crosses a public road already in use, the railroad company and its successors must, if not relieved by statute, not only restore the public road but erect and *maintain perpetually* all structures and keep up all repairs made necessary by such crossing, for the safety and convenience of public travel.

(See now Acts 1889, Ch. 119.)

Case cited and overruled: Railroad v. State, 16 Lea, 300.

Cited and distinguished: Railroad v. Parker, MS.

Cited and approved: Railroad v. State, 3 Head, 522; 46 Md., 445; 49 Md., 269; 67 Ill., 118; 23 Wend., 446; 133 Mass., 185; 50 N. Y., 203; 2 Am. & Eng. R. Cases, 487; 30 N. Y., 212; 31 Ohio St., 338.

2. SAME. *Same. Charter.*

Railroad charter, providing that the company shall construct its track across roads, highways, etc., "so as not to interfere with the free use of the same, and in such manner as to afford and leave in good repair and well constructed for public use all such roads, highways, etc., and shall restore the road or highway thus intersected to its former good condition, or in a sufficient manner not to have unnecessarily impaired its usefulness," does not exempt the railroad company from its common law obligation to maintain perpetually a bridge over the road, made necessary by the crossing, but rather declares and enforces that obligation.

Case cited and overruled: Railroad v. State, 16 Lea, 300.

Cited and approved: 51 Me., 313; 39 Me., 119; 75 Ill., 524; 67 Ill., 188; 49 Md., 257; 39 N. W. R., 153; 22 Conn., 74; 42 Conn., 175; 45 Penn. St., 135; 14 East, 317; 13 East, 220; 3 M. & Sel., 526.

3. SAME. *Same. County may make repairs and recover the cost.*

When the railroad company fails or refuses to perform its duty touching structures and repairs at its intersection with a public road, the county having the work done can recover the reasonable cost thereof.

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4. SAME. *Same. Injunction.*

But when the crossing is in good condition, and there is nothing to indicate that the railroad company will refuse to discharge its duty in the future, the Court will not grant mandatory injunction to compel the company to make future repairs.

## 5. RES ADJUDICATA.

Acquittal of the railroad company of the criminal charge of maintaining a nuisance in the public road at its crossing is not available, as *res adjudicata*, in a suit by the county to recover of the railroad company the costs of removing the obstruction constituting the nuisance.

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FROM DYER.

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Appeal from the Chancery Court of Dyer County.  
H. J. LIVINGSTON, Ch.

LATTA & RICHARDSON and MARSHALL & WATKINS  
for County.

HOLMES CUMMINS and PARKS & DRAPER for Rail-  
road.

CALDWELL, J. In the construction of its road through Dyer County some years ago, the Paducah and Memphis Railroad Company made a deep cut in a hill over which the public road from Dyersburg to Trenton ran, and at the point of intersection erected an overhead bridge across the cut for the use of persons traveling upon the public road. After ten or twelve years of use by the pub-

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lic the bridge fell into decay, became dangerous, and was taken down. In the meantime the defendants in this cause became the successors of that company, and took charge of its road. They failing and refusing to replace the bridge, Dyer County was forced, by public necessity, to rebuild it, at the cost of several hundred dollars. To recover that sum, and to obtain a mandatory injunction requiring the defendants to keep the bridge in repair in the future, this bill was filed.

Complainants contend that the general law and the charter of the original company devolved upon it and its successors the duty not only of *constructing* the said bridge when the railroad was built, but also the duty of *maintaining it in the future*; while the defendants insist that the *whole obligation* so imposed *was discharged* by the erection of the bridge in the first instance.

It is a well-settled rule of the common law, resting upon the most obvious considerations of fairness and justice, that where a new highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience and safety of the crossing must be *erected and maintained* by the person or corporation constructing and using the new way. *Northern Central Railroad Company v. City of Baltimore*, 46 Md., 445; *Eyeler v. County Commissioners*, 49 Md., 269; *People v. C. & A. R. R. Co.*, 67 Ill., 118; *Dygert v. Schenk*,

23 Wend., 446; 1 Thompson on Negligence, 328 and 343.

The same principle, though not so fully stated, was recognized and applied by this Court in the case of the *Louisville and Nashville Railroad Company v. The State*, 3 Head, 522.

That such is the undoubted rule of the common law is fully conceded by the learned counsel of the defendants in argument before this Court, the contention being that the charter under which defendants operate their road relieves them from the duty of *maintaining* the bridge, after having once constructed it in an acceptable and proper manner.

That part of the charter relating to this question appears in the fifth clause, which is as follows:

"*Fifth.*—To construct their road and branches across any stream of water, water-course, road, highway, or railroad, so as not to interfere with the free use of the same, and in such manner as to afford and leave in good repair, and well constructed for public use, all such streams of water, water-courses, roads, highways, streets, and alleys, and shall restore the stream of water, road or highway, street or alley, thus intersected to its former good condition, or in a sufficient manner not to have unnecessarily impaired its usefulness or injured its franchises." Acts 1857-8, Ch. 42, Sec. 49.

Clearly, there is no *express* diminution of the company's common law obligation to be found in this provision; nor do we think there is any thing

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in the language used to authorize an *inference* that the Legislature intended to diminish that obligation in the least degree.

This view of the charter, without more, would leave the full measure of the common law responsibility resting upon the company; but we are constrained to go further, and, upon a construction of the language of the charter, hold that it not only does not excuse the company from the continuous duty of maintaining the bridge in a good and safe condition, but unquestionably enforces that obligation.

The requirement that the railroad shall be so constructed as not to interfere with the free use of the public highway, and that the latter, at the point of intersection, shall be restored to its former good condition, so as not to impair its usefulness unnecessarily, implies and carries with it the obligation *to keep* such highway in that same state of repair and usefulness.

The requirement, so construed, is both reasonable and just, and may well be said to be an embodiment of the principle that one must so use his own rights as not to take away or injure the rights of others.

There was no good reason why the common law burden of maintaining the bridge should be shifted from the railroad company and cast upon the county, when the former and not the latter was to reap the fruits of the road whose construction alone made the bridge a necessity; but, on the

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contrary, there was the best of reasons for requiring the company to bear all expenses necessary in constructing and *keeping up* the crossing, as we hold the Legislature, in fact, intended, so that the county would be injured as little as possible, and have no greater burden imposed upon it in maintaining its public highway than it would have had if the railroad had never been constructed at all. Or, to state the same proposition a little differently as applied to the facts of this case, it was contemplated and intended that the county should be saved harmless so far as could be, and yet permit the railroad to cross her highway in such manner and at such place as might be necessary to the due exercise of the powers and the enjoyment of the franchises conferred upon it by the Act.

The construction we have given this charter is the same as that placed upon similar charters and statutory provisions by the Courts of last resort in many of the States, and is sustained by the current of authority. *Willcome v. Leeds*, 51 Me., 313; *Veazie v. Railroad Company*, 39 Me., 119; *Railroad Company v. Moffitt*, 75 Ill., 524; 67 Ill., 188; 49 Md., 257; *State ex rel. v. Minn. & St. L. Ry. Co.* (Minn.), 39 N. W. R., 153; *Nicholson v. Railroad Company*, 22 Conn., 74; *Burritt v. City of New Haven*, 42 Conn., 175; *Phoenixville v. Phoenix Iron Company*, 45 Penn. St., 135. See also, to same effect, *The King v. Inhabitants of Lindsay*, 14 East, 317; *Rex v. Inhabitants of Kent*, 13 East, 220; *Rex v. Kenison*, 3 M. & Sel., 526.

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The text writers, so far as we are advised, treat this as the settled rule of construction. Says Mr. Pierce :

“The laying of a railroad across highways often requires excavations and erections, and a greater or less change in the surface. The duty, however, to restore the highway, as far as may be, to its former condition, and to erect and *maintain* structures necessary for such restoration, is presumed to be incumbent on the company, *even without any express requirement imposed by statute.*” Pierce on Railroads, 245.

In speaking of the usual requirement that the railroad company shall restore the highway which it crosses to its former state so as not to impair the latter's usefulness, Mr. Mills remarks: “The word ‘usefulness’ implies capabilities for use, and appertains to *the future* as well as the present.” Mills on Eminent Domain, Sec. 198.

“But such crossings and places so occupied are to be restored by the railroad company to as passable condition, *and so kept*, as is consistent with the use thereof by the railroad company.” 1 Rorer on Railroads, 456 and 554.

Mr. Wood says:

“If the statute simply provides that the company ‘shall restore the highway to its former state of usefulness’ etc., they are invested with a discretion in the matter, \* \* \* and are also charged with the further duty of *keeping* that part of the highway in proper condition.” 2 Wood

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on Railway Law, 976-7, citing *Cooke v. Boston & Lowell R. R. Co.*, 133 Mass., 185, and other cases.

The same author says, on page 958 of same volume:

"The right to lay a railway track in a public street or highway carries with it the obligation not only to lay it in a proper manner, but also to keep it in repair," citing *Worster v. Street R. R. Co.*, 50 N. Y., 203, and *Kellinger v. Same, Ib.*, 206.

Under the head, "When private person or corporation bound to repair," Mr. Thompson says:

\* \* \* "The books afford many illustrations of this rule. Thus, a person or corporation cuts a canal or mill race across a highway. He or it must bridge the same in a substantial manner, and keep the bridge in safe repair." \* \* \* So the owner of a railway crossing the highway, must restore the highway, by a bridge or otherwise, and, if a bridge, *must keep the bridge* in repair, or pay to any person the damages flowing from this neglect. 1 Thompson on Neg., p. 343, Sec. 5.

"Private corporations generally, canal companies, railway, and other private corporations, are bound to repair all bridges erected by them, under their charters, over public highways, especially where a revenue is derived from them." Am. & Eng. Ency. of L., Vol. 2, p. 556, and cases cited.

Again, "where a public company, as a navigation company, under powers conferred by the



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Legislature, destroyed a ford and substituted a bridge, it was held that they were liable to keep the bridge in repair. So, too, where such company cut through a highway, rendering a bridge necessary to convey the highway over the cut, the company are bound to keep such bridge in repair." 1 Redfield on L. of R'ys., (3d Ed.) p. 404, Sec. 110. Same rule as to railways, in England, is stated by same author on page 399, Sec. 108, Subsec. 8.

Upon very much the same principle it has been decided in Illinois that where one railroad company condemns a right of way across the right of way of another railroad company, the amount recoverable by the latter from the former, as compensation for the property taken, should include "a sum sufficient to erect *and maintain perpetually* a bridge," rendered necessary by an excavation made under the tracts of the latter by the former. *St. L. J. & C. R. R. Co. v. S. & N. W. R. R. Co.*, 2 Am. & Eng. R. R. Cases, 487.

Some of the cases go even further than we are called upon to go in this case, and hold that the duty to maintain the crossing of the highway is not only a continuous one, but that it also binds the company making it to enlarge and extend the bridge, or crossing, originally made, if, by increase of population and public travel, it becomes inadequate. *Cooke v. B. & L. Ry. Co.*, 10 Am. & Eng. R. R. Cases, 328; *Manley v. St. Helen's Con. & Ry. Co.*, 2 H. & N., 840; *English v. N. H. & N.*

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Dyer County v. Railroad.

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*Co.*, 32 Conn., 241; 42 Conn., 174; 1 Redfield on L. of R'ys, p. 538, Sec. 132.

The Courts, in a few of the States, seem to have adopted a different rule of construction, and decided that a railroad company which intersects a public highway has discharged its full obligation to restore the highway to its former state of usefulness when it has once constructed a suitable bridge, or crossing, and that it is not bound to keep it in repair. *Mo. R. R. Co. v. Long*, 27 Kansas, 684; *R. R. Co. v. Manser*, 21 Ohio St., 421; *Brookins v. R. R. Co.*, 48 Ga., 523.

This latter construction was adopted by this Court in the case of *Railroad Co. v. The State*, 16 Lea, 300, which was an indictment against the company for failing to keep in repair the very crossing involved in the present litigation. The decision in that case, however, was rested upon no other authority than that of the case of *E. T., V. & Ga. R. R. Co. v. Parker*, MS.

Though apparently going to the point for which it was cited, the facts of the latter case did not justify a decision of the question here involved. There it was sought to hold the company liable in damages for injuries claimed to have been received through the failure of the company to keep in repair "a small bridge built NEAR its road-bed," at the intersection of a public county road. The obligation of the company to maintain the crossing itself, or an overhead bridge, as in the present case, was not and could not have been author-

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itatively considered or decided. So that the opinion in that case, so far as it is supposed to treat of the precise legal question now before us, is but *dictum*, and was not authority on the point for which it was cited in the 16th Lea case.

This being true, and believing, as we do, that the 16th Lea case is not supported by sound reason, and that it is contrary to the intention of the Legislature and the great weight of authority, we are constrained to overrule it as a precedent.

Since this litigation arose our Legislature has passed the following statute: "That all persons, companies, corporations, or syndicates owning or operating a railroad or railroads in the State of Tennessee be required to make and furnish good and sufficient crossings on the public highways crossed by them, and keep same in lawful repair at their own expense." Acts 1889, Ch. 119, Sec. 1.

This opinion, however, is not in any sense or to any extent grounded upon that enactment, but it is based alone upon the common law and the charter construed.

Passing the construction of the charter, the defendants plead and rely upon the decision in the 16 Lea case as *res adjudicata*. The sufficiency of this defense does not depend, of course, upon the authority of that case as a precedent, but upon the altogether different consideration as to whether or not the question now involved was so adjudged as to be binding upon the complainant (Dyer County

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Dyer County v. Railroad.

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and her Bridge Commissioners), and become a bar to this action.

Without discussing, or stating in detail, the well established rules by which the sufficiency of such a defense is to be determined, we are content to say, in brief, that it certainly is not made out in this case, because the parties in this and in the former litigation are not the same in fact or in privity of interest, and furthermore because an adjudication in a criminal prosecution is not a bar to a civil proceeding. 1 Greenleaf's Ev., Sec. 537; Milliken's Meigs' Digest, Sec. 1739, Subsec. 2; 2 Wharton's Law of Evidence, Sec. 776.

Then we hold that it was the duty of the defendants to replace the bridge in question, and that, having failed and refused to do so, they are liable to the county for the amount expended in replacing it for them. *Penn. R. R. Co. v. Irwin*, 85 Penn. St., 386.

That it may not be exactly the same structure in all respects that the defendants would have erected if they had undertaken the task on their own account cannot alter the fact of their liability, for the bridge is shown to be such as the necessities of public travel demand, and substantially the same as the one originally erected by the company, though slightly more to the convenience and advantage of the defendants.

What has been said of the obligation of the original company is intended to apply with like force to those defendants, for the duty imposed by

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a charter in the first instance passes to and rests upon the successors to the first company. *People v. C. & A. R. R., Co.*, 67 Ill., 118; *Wasmer v. D. L. & W. R. R. Co.*, 30 N. Y., 212; *L. M. R. R. Co. v. Commonwealth*, 31 Ohio St., 338.

The bridge being now new and in good condition, and there being nothing in this record to indicate that the defendants will longer refuse to maintain it after this adjudication of their duty so to do, the mandatory injunction sought by the complainants will not be granted.

Let the decree of the Chancellor dismissing the bill be reversed, and decree be entered here in conformity to this opinion. The defendants will pay all costs.

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 Moore v. Tate.
 

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## MOORE v. TATE.

(Jackson. May 28, 1889.)

1. INTERSTATE LAW. *State's immunity from suit.*

Other States are exempt from suit in our Courts, either by original or cross-action, to the same extent as our own State.

2. SET-OFF. *Not allowed against the State, when.*

Our statute regulating "set-off and cross-action" has no application to suits brought in our Courts by a State; and the defendant in such action cannot avail himself of a distinct and independent demand, not growing out of or connected with the subject-matter of the original suit, as a defense to the suit.

Code construed: § 3628 (M. & V.); § 2918 (T. & S.).

Cases cited and approved: *State v. Ward*, 9 Heis., 111; *Tappan v. Railroad*, 3 Lea, 106; 12 Bush (Ky.), 673; 75 N. C., 1; 30 La. Ann., 541; 2 Dutch. (N. J.), 399; 3 Met., 526; 26 Vt., 486; 34 Md., 344; 10 Tex., 315; 4 Dall. (Penn.), 303; 14 La. Ann., 636; 18 Ala., 767; 3 Rich. (S. C.), 372.

Cited and disapproved: 81 Ky. Rep., 573; 1 Met., 174; 1 Bay's Rep., 500; 18 Ga., 658.

## 3. CASE IN JUDGMENT.

Alabama sued citizens of this State in our Courts, upon a note given in settlement of the penitentiary lease of that State. The defendants presented, by way of set-off or cross-action, matured coupons for interest due on the bonds of the State of Alabama, which they had duly presented for payment.

*Held:* That the set-off could not be allowed against the State's demand.

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 FROM SHELBY.
 

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Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

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Moore v. Tate.

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HEISKELL & HEISKELL for Moore.

GANTT & PATTERSON for Defendants.

FOLKES, J. This was an action brought in the Circuit Court of Shelby County to recover of Sam Tate and associates the balance due, after allowing sundry credits, upon the following acceptance:

"MONTGOMERY, ALA., March 28, 1873.

"Sixty days after date, pay to the order of M. G. Moore, Commissioner for the State of Alabama, or order, twenty thousand dollars, at the banking house of Josiah Morris & Co., Montgomery, Ala., for value received, in settlement of the penitentiary lease. (Signed) SMITH & McMILLAN.

By WM. SMITH, *Ag't*.

"Accepted:

"CAMPBELL WALLACE, W. B. GREENLAW,

"J. W. SLOSS, M. B. PRICHARD,

"SAM TATE, M. J. WICKS."

The parties thus accepting the draft composed the firm of "Sam Tate and Associates."

Defendants pleaded *nil debit*, payment, statute of limitations, and a special plea of set-off, wherein it was alleged that defendants were the owners and holders of certain coupons then due, issued by the State of Alabama to cover semi-annual interest on certain bonds of said State, which coupons, it was alleged, had been presented to said State of Alabama for payment and payment refused, and that the State declined to allow the said coupons as a

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credit on said acceptance; that said coupons, with interest thereon at the rate of eight per cent. (the legal rate in Alabama, where said coupons are made payable), exceed the balance due the State of Alabama on the acceptance, after allowing the like rate of interest, wherefore they say that "defendants hereby offer said coupons, and the interest due thereon, as a set-off against plaintiff's demand, and ask that the same be allowed to the extent of the balance due plaintiff; and, by reason of the averments set forth herein, the plaintiff is not entitled, in this action, to any other or further judgment against them except a judgment for the costs of this suit."

The State joined issue on the pleas of *nil debit*, payment, and statute of limitations, but demurred to the set-off or cross-action, and for cause of demurrer set down the following:

"*First.*—That the State of Alabama is not subject to suit, either original or by cross-action.

"*Second.*—The claim sued on is one due the penitentiary of the State of Alabama, contracted with the State in a settlement of a business and commercial transaction, while the set-off is upon coupons from bonds of the State issued by it in its sovereign capacity, and on which the State is not subject to be sued, but for which the holder can look alone to the honor of the State."

There were other grounds of demurrer, which need not be stated.

The Court overruled the demurrer. Plaintiff



interposed additional replications, to which defendants demurred, which, being overruled in part and sustained in part, led to further pleadings, none of which need be mentioned, in the view we have taken of the case.

Such further proceedings were had that the cause came on, finally, to be heard before the Circuit Judge, without the intervention of a jury, when it was made satisfactorily to appear, and it was so adjudged, that there was due the plaintiff on said acceptance, after allowing all credits properly pertaining thereto, a balance of \$5,702.97; and that there was due the defendants on matured coupons detached from bonds of the State of Alabama, as alleged in their several pleas of set-off, with interest thereon, the sum of \$7,069.39. The final entry, after finding the respective amounts as just stated, continues as follows:

“Thereupon plaintiff moved the Court, notwithstanding the pleas of defendants, to render judgment in favor of the State of Alabama against them for said sum of \$5,702.97; and the defendants, on the contrary, insisted that, as it appeared the State of Alabama owed them more than said amount on said matured coupons in their said pleas pleaded as a set-off or counter claim, the plaintiff was only entitled to a judgment for costs, and that said set-off or counter claim should be allowed to the extent of plaintiff's said demand. The Court is pleased to disallow the motion of plaintiff and to allow the defendants said set-off or

counter claim to the extent of plaintiff's demand."

The Court thereupon ordered that the Clerk cancel and surrender to plaintiff's attorney so many of said coupons as would, with interest, amount to the \$5,702.97, and to return the remaining coupons to defendants. Judgment was then rendered against defendants for costs only.

From such final judgment plaintiff has appealed in error.

The party for whose use the suit is brought is the real plaintiff; so that the State of Alabama is, to all intents and purposes, the party plaintiff in the action brought to recover judgment on the acceptance set out in the declaration.

While a sovereign State may bring and maintain a suit as any other suitor, she cannot be sued in her own or a foreign Court, unless she has signified her consent thereto, either by statute or by some other unequivocal means.

These universally recognized principles are not challenged by the learned counsel for the defendants, but his contention is that the State of Alabama, having invoked the jurisdiction of the Courts of this State, for the purpose of recovering a judgment against a citizen of Tennessee, must submit itself to the same jurisdiction for the purpose of allowing such citizen to interpose any defense he may have, to the extent of preventing any recovery against him; "that when the State undertakes to litigate with the citizen the latter may, by way of

set-off or counter claim, make such defense as will defeat the recovery, though not entitled to a judgment over against the State, in the absence of some legislative enactment authorizing the recovery."

This contention goes too far. It is true that when the State voluntarily places itself in the position of a suitor, whether in its own Courts or in those of a sister State, it will be held to have laid aside its sovereignty, and to have taken on the garb of an ordinary suitor, so far as concerns all proper matters of adjudication growing out of the cause of action sued on, and the defendant would be entitled to plead and prove any and all matters properly defensive, including credits and set-offs, so far as the latter are dependent on, connected with, and grew out of the transaction which constitutes the subject-matter of the suit. See *State v. Ward & Briggs*, 9 Heis., 111; *Tappan v. W. & A. R. R. Co.*, 3 Lea, 106.

Such defenses, though sometimes called set-offs, are not strictly set-offs. "A counter claim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counter claim is, that they are wholly independent suits, which, for convenience of procedure, are combined in one action," as was said in *Winterfield v. Bradmeen*, 3 Q. B. D., 326; *Am. & Eng. Ency. of L.*, Vol. IV., p. 332, and cases cited.

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Set-off was unknown to the common law. It was allowed in England by statute, 2 Geo. II., Ch. 22, which has, in the main, been generally adopted in this country.

As introduced into this State by statute, the right of set-off is incidental to, and dependent upon, the fact of the plaintiff having established a right of recovery against the defendant. If this fails the right of set-off does not exist. *Edington v. Pickle*, 1 Sneed, 122. Such was the construction given to the Act of 1815, Ch. 53.

It was likewise restricted in its operation to the abatement or extinguishment of the plaintiff's demand, as the case might be. Under the Act of 1852, carried into the Code, § 3632 (M. & V.), where the set-off pleaded by the defendant is found to exceed the claim of the plaintiff, the Court is directed to render judgment in favor of the defendant and against the plaintiff for the excess of the set-off over the plaintiff's demand.

"The plaintiff may, at any time before the jury retires, take a non-suit, or dismiss his action as to any one or more defendants; but if the defendant has pleaded a set-off or counter claim, he may elect to proceed on such counter claim in the capacity of a plaintiff." § 3678 (M. & V.) Code.

In this connection it may be stated that the record in this case shows that when the plaintiff's demurrer to defendant's plea of set-off was overruled, the plaintiff moved to be allowed to dismiss his suit, which was by the Court refused, upon the

defendants electing to proceed, in the capacity of plaintiffs, to have their counter claim adjudged to the extent of plaintiff's demand.

Not being allowed to dismiss unconditionally and absolutely, so as to carry the whole case, the plaintiff, reserving exceptions to the action of the Court, elected to continue the prosecution of its suit.

The statute enacts that mutual demands, held by the defendant against the plaintiff at the time of action brought, and matured when offered, may be pleaded by way of set-off or cross action. Subsec. 1 of § 3628.

To give to the language of this statute a literal meaning would be to allow defendants' contention. But are we authorized to do so? Such reading would also embrace a debt barred by the statute of limitations, a gambling debt, a demand for usury, a *premium pudicitiae*, any demand *turpi causa* or against public policy. It is manifest that none of these mutual demands are within the meaning of the statute, because they are not enforceable by suit at law.

The evil that the statute was intended to remedy was, that where two persons held separate and disconnected debts against each other, they were driven to the expense and vexation of two separate suits. As the books say, they were "distinct and inextinguishable except by actual payment or release." The statute was intended to dispense with the necessity for two suits, and to permit one suit to settle the whole. It did not give, and was not

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intended to give, a right of suit to either party where none existed before, or make other change in rights, but merely to pool the remedies. The mutual demands referred to and provided for were such, and such only, on which separate suits would lie independent of the statute.

In Wait's Actions and Defenses Vol. VII., page 477, it is said: "And it is laid down as a rule that a claim is available in set-off at law only when it is a debt on which the defendant could maintain an action at law against the plaintiff." To this general proposition the author cites numerous authorities, covering a great variety of claims on which suits will not lie at all, or cannot be brought by a defendant in his own name and right. Among the cases cited for the text as above quoted is *Battle v. Thompson*, 65 N. C., 406, where it was expressly adjudged that a party sued on a bill single, payable to the public Treasurer, given for cotton sold by such Treasurer, could not plead, by way of set-off to such action, valid coupons taken from the bonds of the State. The judge delivering the opinion says:

"The test of a set-off or counter claim, under the statute, is this: Could the defendant maintain an action against the plaintiff? Tried by this test the defense fails, for a citizen cannot maintain an action against the State."

If our own consideration of the question had not led us to the same conclusion we would be constrained to give much weight to this decision,

in view of the fact that our statutes on the subject are derived from North Carolina as the mother State.

Whether a State should consent to be sued, so as to put itself on an equality with the citizen, is not a matter for the Courts, but for the Legislature.

Our own State, for awhile, authorized itself to be sued, but by Act 1865, Ch. 36, § 34, repealed the statute authorizing such suits, which repealing statute was held not obnoxious to any constitutional objections. *Watson v. The Bank*, 3 Bax., 395.

The same considerations of public policy which prompted the Legislature to prohibit suits directly against the State would lead the Courts to hold that she should not be sued indirectly, under the general terms of the statute of set-offs, which do not expressly allow such suit.

If such right to plead a set-off exists as against the State by force of the statute (and it cannot exist without the statute as to matters not growing out of and connected with the particular transaction), then it must necessarily follow that the defendants would be entitled to judgment over for the excess, for the right to judgment for such excess is as much an essence of our statute, as is the right to plead the set-off defensively, since the Act of 1852.

When the defendants here opposed the effort of the plaintiff to take a non-suit, did they not do so under the statute which authorized them to

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proceed in the capacity of plaintiffs? If in the capacity of plaintiffs they prosecuted their set-off, are they not suing the State? Does the fact that they only asked to have their claim adjudged to the extent of plaintiff's demand make them any the less plaintiffs, when they hold the State in Court against its will for the purpose of having the set-off adjudged?

The defendants insist that if such were the proper construction to be applied to our own State, it should not be extended to a foreign State, who is permitted to sue, in our own Courts, a citizen of this State; that this is carrying comity too far. It would certainly be but scant courtesy to a sister State to extend to her the privileges of a suitor in our Courts, were we to couple with such privilege burdens which are not incident to such position when not assumed by this State.

It is difficult to anticipate to what excesses such conduct might lead, and to what extent retaliatory measures might be carried.

But apart from such selfish considerations, it is sufficient to say that it is without exception, so far as we know, that the Courts of one State, in dealing with a sister State, extend to it all the privileges enjoyed by the State in which the Court is held, unless there be some imperative rule of law to the contrary.

So that in the consideration of the case at bar we have treated and propose to treat the question as though it concerned the State of Tennessee.



Set-off, as we have seen, not being known to the common law, if it exists as against a sovereign State, must rest upon the statute. If our statute authorizes it at all, it necessarily authorizes it to the full extent given by the statute to private suitors, for there is nothing in its terms to give it a qualified or purely defensive operation; so that in *all cases* where the State might be driven to the necessity of bringing suit against a citizen, such citizen must be allowed to interpose a claim for an independent demand, and after satisfying, it may be, a small demand of the State by the set-off, have judgment over against the State for a large one. In this way the bonded indebtedness of a State, issued in its sovereign and political capacity, predicated entirely upon the faith and credit of the State, to be provided for by the legislative branch of the Government, might be made the subject of suit by such indirection. So, too, every tax payer might discharge his obligations to the Government, in those States where taxes are a personal debt as well as a lien upon the property assessed, to the impoverishment of the State Government.

But it is said that this right of set-off is not applicable to taxes, because of the necessities of Government which require that nothing should stand between the State and its revenues, its life-blood, and that a claim or demand based upon commercial paper or other like evidence of indebtedness stands upon a different footing. If we

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were to admit that there is a difference in the character of the debts supposed, it does not follow that the Courts can for themselves declare such difference, in the application of the statutes of set-off, where the statutes themselves make none.

In construing the statutes in question we are to ascertain whether the State is, or is not, within their operation. If not, that is an end of the controversy. If within the statute, where is the authority for the Courts to regulate its scope and application? How, and by what authority are we to say that certain debts of the State are within and others without the operation of the statute?

If we are told that we should apply it to all suits except for revenue, who is to determine, and how are we to say, what demands are "for revenue only?" Are taxes the only sources of revenue? Our own State leases its penitentiary for one hundred thousand dollars a year. Ways and means and appropriations are doubtless predicated as much upon this source of income as upon a like amount of assessed taxes. What is the principle, and what the rule, upon which the Courts are to refuse a set-off in a suit for assessed taxes, and allow it in a suit for rent due under the penitentiary lease?

Illustrations might be multiplied of the sources of income to the State, and of the difficulty of determining whether they are to be considered as revenue.

That set-off against taxes due the government will not be allowed has been held in the following

cases: *Newport Bridge Company v. Douglass*, 12 Bush. (Ky.), 673; *Cobb v. Elizabeth City*, 75 N. C., 1; *City of New Orleans v. Davidson*, 30 La. Ann., 541-554; 2 Dutch (N. J.), 399; 3 Metc., 526; 26 Vt., 486.

The case of *State v. Franklin Bank*, 10 Ohio, 91, referred to by counsel for defendants, was an agreed case, where the State, by its attorney, consented to try the question of set-off to the claim for taxes.

That the immunity from suit possessed by the State, as a prerogative of its sovereignty, applies to a cross-action by set-off, unless expressly provided otherwise by statute, is fully sustained by the following adjudications, which we have examined: *State v. B. & O. R. R.*, 34 Md., 344; *Chevallier's Admr. v. State*, 10 Tex., 315; *Commonwealth v. Matlock*, 4 Dall. (Penn.), 303; *State v. Leckie*, 14 La. Ann., 636; *White v. The Governor*—18 Ala., 767; *Treasurer v. Cleary*, 3 Rich. (S. C.), 372. This last case virtually overrules, without referring to, the Gaillard case in 1 Bay, cited by defendant's counsel.

Counsel for defendants press upon us certain cases which they insist sustain their contention. We have examined them all, together with others not referred to, and while the argument in some of them does go to the extent claimed for them, they are found, so far as the point decided is concerned, to be bottomed upon the United States statute, so far as they have any solid support. Let us now glance briefly at these cases:

*Schaumburg v. United States*, 103 U. S., 667, is merely an affirmance of the case of *United States v. Eckford*, 6 Wall., 484. The latter case shows clearly that "this is a question which arises exclusively under the Acts of Congress, and no local law or usage can have any influence upon it." Again, in this case it is said:

"No action of any kind could be sustained against the Government for any supposed debt, unless by its own consent; and that to permit a demand in set-off to become the foundation of a judgment would be the same thing as sustaining the prosecution of a suit."

This was a case where, after allowing credits to the extent of the Government's demand (which was permissible, as we have seen, independent of statute, where the credits grew out of the Government's demand, and which was allowable under the United States statute to the extent of the demand, independent of origin of the credits), the Circuit Court had rendered judgment for the excess due by the Government. The action of the Circuit Judge was sought to be justified by the State statute of New York, which authorized such judgment for the excess. The Supreme Court held that the State statute could not confer jurisdiction to render such a judgment—it was not a question of practice, but of jurisdiction; and its action in allowing the set-off to be pleaded, even defensively, to the extent of the Government's demand, is placed upon the Act of Congress. The Judge de-

livering the opinion used this language: "When the United States is plaintiff, and the defendant has pleaded a set-off, *which the Acts of Congress have authorized him to do*, no judgment can be rendered against the Government," although there is an excess due the defendant. (The italics are ours.) The Act of Congress referred to is that of March 3, 1797, Ch. 74, Secs. 3 and 4. 1 Stat. at Large, 515.

It is said in the 18 Georgia case, which will be presently noticed, that this Act of Congress does not grant any power, or right, to plead a credit or set-off, but merely restricts a right already existing.

That such is not the view of the Supreme Court of the United States—the Court of last resort as to construction of Acts of Congress—is shown by their language in this case of *United States v. Eckford*. After citing and giving the substance of the Act of March 3, 1797, the Judge delivering the opinion says: "The extent of the *authority conferred* by that section is as plain as any *grant of power* can well be, which is *conferred* in clear and unambiguous language." Page 489.

To the same effect is *United States v. Robeson*, 9 Peters, 319; *United States v. Giles*, 9 Cranch, 212, both of which cases show that but for the statute in question, no set-off, even defensively, would be allowed against the government. See also *United States v. Wilkins*, 6 Wheat, 135.

The case of the Siren, 7 Wall., 154, stands upon

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the idea that while the vessel itself could not be proceeded against by one holding a maritime claim so long as she was in the possession of the Government, yet, when the vessel is sold, and the proceeds are in the registry of the Court, such funds will be distributed by the Court according to priorities as they exist under admiralty laws.

Hence it was that the owners of a vessel and cargo, that had been sunk by the carelessness of the prize crew in charge of the Siren, were allowed compensation out of the funds realized by the sale of the prize. The decision clearly recognizes that the claim for such damages could not be made against a vessel of the United States, and the disposition of the case rests largely upon the analogy to the assumed liability of Government property for salvage, or general average contribution.

At all events, there is nothing in this case that stands in the way of the conclusions we have reached in the case at bar. And it must be admitted that there is a good deal of force in the suggestion of the dissenting Judge, that "there is certainly some difficulty in distinguishing between a proceeding against the fund in the registry and a proceeding against the vessel itself," although his quarrel with the opinion of the majority was upon another ground.

In *United States v. Mann*, 2 Brock., 9, though the learned Judge discusses at length the inherent right and justice of a claim of set-off, he finally rests the decision upon the Act of Congress already

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referred to. It is needless to refer specially to any of the other cases from the Federal Courts, as they will be found to rest upon the Act of Congress in question.

In *The Commonwealth v. The Owensboro & Nashville Railroad Company*, 81 Ky. Rep., 573, the Court does say that "when the State undertakes to litigate with the citizen, the latter may, by way of set-off or counter claim, make such defense as will defeat the recovery, but is not entitled to a judgment over against the State, in the absence of some legislative enactment authorizing the recovery." This is the language of defendant's contention. It is sufficient to say of this case that it contains no discussion of the question—it cites no authority. It was a suit for taxes, and it was adjudged that no taxes were due. So that at best it is a *dictum* merely.

Again, in *Sinking Fund Commissioners v. Northern Bank of Kentucky*, 1 Met., 174, the announcement was equally uncalled for, for the reason that the suit was not by the State, but by a corporation created by the State, subject to sue and be sued. Even if the suit had been by the State, the set-off interposed was that of an incumbrance on the property bought by the defendant. It grew out of the same transaction, and would have been admissible in our State under the doctrine to be found in *State v. Ward & Biggs*, 9 Heis., 111, *supra*.

*State v. Gaillard*, 1 Bay's Rep., 500. This case

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is extremely brief, and seems to rest upon an amercement act which it is impossible to understand from the meager reference to it in the opinion; no discussion, and no authority cited. It is virtually a set-off allowed against a tax, however, and is therefore unsustainable on any ground short of a direct statute.

*Abner P. Powers v. The Central Bank*, 18 Ga. Rep., 658, it must be admitted, goes to the full length claimed by the counsel for defendants. It is, however, involved in this dilemma: After referring to some of the Federal Court cases where set-offs were allowed, it says that it might be supposed that they rested upon the Act of Congress of 1797, and it undertakes then to say that "this Act gives no right whatever to plead a set-off or use any discount, but regulates and restrains a right as already existing," while the case closes with this language: "If we might presume so far, we would respectfully recommend the passage of a law by our State Legislature, *substantially the same as the Act of 1797, expressly allowing* to defendants, when sued by the State, the privilege of pleading, by way of set-off or discount, any demand, legal or equitable, which they might have or hold in their own right against the State, provided no judgment be rendered for any excess," etc.

Somewhat illogical is the suggestion that the Legislature should pass an Act "substantially the same as the Act of 1797, expressly allowing set-off," when the argument leading to the decision had as-



sumed that the Act in question gave no right whatever, but merely limited a right already existing independent of the statute.

The earnestness and ability of counsel for defendants, who were successful in the Court below, and the importance of the question, which is for the first time presented for adjudication in this State, must be our excuse for reviewing the authorities cited, when our own conclusions had already been reached with confidence and satisfaction, at least to ourselves, and when principle and authority were ample in our support.

As has been said, "it is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own Courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and may withdraw or withhold its consent whenever it may appear that justice to the public requires it." *Burr v. Arkansas*, 20 How. (U. S.), 529.

Where and how can it be said that the State of Alabama has consented to be sued on the coupons declared on in the plea of set-off here? The only answer vouchsafed is that by voluntarily bringing her suit against the citizen, she thereby signi-

fies her consent to the cross-action. The logic of which is that she can never maintain her action against a recalcitrant debtor without, at the same time, exposing herself to the hazard of being met and overwhelmed with the presentation of her outstanding securities which the exigencies of the Government may have rendered it necessary to withhold payment of, in whole or in part, temporarily or otherwise; and all this upon the construction of a statute which does not in terms apply, and was manifestly never intended to apply to the sovereign.

But, without further discussion, we hold that an independent claim cannot be set-off against a demand of the State, defensively or otherwise, without the affirmative consent of the State, and that the Courts of this State will apply to a sister State suing here the same rule in this respect that is applicable to our own State when a plaintiff.

It follows, therefore, that the judgment of the Circuit Judge must be reversed, and judgment rendered here for the full amount of the balance due on the acceptance sued on, as ascertained in the judgment of the Court below, with interest and costs.

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Railway Company v. State.

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RAILWAY Co. v. STATE.

(*Jackson*. June 1, 1889.)

1. STREET RAILWAY. *Continuing duty to repair.*

A street railway company is bound to keep its entire road-bed, to the ends of its ties, and its crossings, in repair, so as not to obstruct travel across its road or longitudinally upon it, and this duty is a continuing one, whether the charter so expressly requires or not.

Cases cited and approved: *L. & N. Railroad Company v. The State*, 3 Head, 524; *Am. and Eng. Railway Cases*, Vol. X., page 332, note; *Burritt v. City of New Haven*, 42 Conn., 174.

Cited and overruled: *Railroad v. The State*, 16 Lea, 300.

2. STREET RAILWAY COMPANY. *Indictment.*

A street railway company, failing to so repair, and thereby obstructing travel, is indictable for maintaining a nuisance, and, upon failure to abate the nuisance, the obstructions may be removed by order of the Court.

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FROM SHELBY.

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Appeal in error from Criminal Court of Shelby County. May Term, 1888. J. J. DuBOSE, J.

GANTT & PATTERSON for Railway Company.

JAMES M. GREER and Attorney-General PICKLE for the State.

J. M. DICKINSON, Sp. J. The defendant railway company and Wm. Katzenberger were indicted for

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creating and maintaining a nuisance in McLemore Avenue, Shelby County, and it is charged that such nuisance was consequent upon the unlawful location and improper maintenance of a railway on said avenue. Wm. Katzenberger was receiver of the defendant company, and the condition complained of in the indictment existed at the time of his appointment and continued during his management up to the time of indictment.

It appears from the evidence, that the part of the avenue occupied by the track of the defendant company was not, at all points, in such condition that the same could be crossed by travelers on horseback or in vehicles, or be traveled over longitudinally with safety. By an agreed state of facts it appeared that the "railroad tracks, its ties and rails, were above the surface of McLemore Avenue, a public road at the time laid in the indictment, and obstructed public travel on that part of said highway occupied by said railroad, as alleged in the indictment."

The decision of the cause was submitted to the Judge without a jury, and he found defendants guilty as charged in the indictment, fined them one thousand dollars, and ordered the obstructions to be removed, unless defendants should so do within thirty days. It appearing that the receiver had no means and no authority, under his appointment, to abate the nuisance, or pay the fine, the amount of his fine was reduced by the Court to five dollars.

On January 29, 1887, the Memphis, Greenwood,

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and Prospect Park Railroad Company was incorporated under the regular form provided for street railroad companies, as set out in §§ 1920-1925 of the M. & V. Code. Section 1921 provides that such companies are "authorized to consummate any contract with the County Court necessary to get the right of way along the public roads of the county."

At the April Term, 1887, said company applied to the County Court of Shelby for permission to lay its tracks upon that portion of McLemore Avenue designated in the indictment, and on April 22, 1887, a contract was made between the county and said company, whereby the county consented to the construction of a railroad by said company upon said portion of McLemore Avenue. This contract contains provisions as to the manner of grading and constructing the road, and provides that the company, "at the crossing of each street and alley on said avenues and roads, shall place good and sufficient crossings, so as not to interfere with travel over such streets and roads."

There is no stipulation for the keeping in repair by the company of any portion of the avenue occupied by its track, or of the crossings.

On October 24, 1887, the defendant, the Memphis, Prospect Park & Belt Railroad Company, was chartered under the form provided for steam railway companies.

Defendant company, so far as the record shows, had no contract with the county, but on November 22, 1887, it purchased the franchises and prop-

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erties of the Memphis, Greenwood & Prospect Park Railroad Company, which included the line of railway then being operated upon McLemore Avenue by said company under its charter and its contract with the county.

On April 10, 1888, a committee, to whom had been referred a petition of the Memphis, Greenwood & Prospect Park Railroad Company, reported that they had gone over the track and road-bed of said company located on said portion of said avenue and found the grading satisfactory. Nothing is said in this report, nor in any other proceedings of the County Court, which appear in the record, about the manner of construction of the road, and nothing of the acceptance of the road by the county, as having been constructed in accordance with the contract with the county, as counsel for the defendant contend.

There was no change in grade, and no repairs from the time of said report up to the time of indictment.

The railroad provided for in the charter and the contract with the county is that known as a street railroad. Such a road contemplates travel upon it longitudinally. This is manifest from the charter, which provides for other vehicles, yielding the right of way over the track and switches to the passing cars, and for the cars yielding the right of way of the track to the fire engines. (M. & V. Code, § 1924.)

There is no proof by defendant as to how the

road was constructed. It relies upon the alleged acceptance by the county as conclusive evidence that it was, on April 10, 1888, up to the requirements of its charter and of the contract with the county, and the further legal proposition that, having so constructed its road, it was under no obligation to keep the road-bed and crossings in repair.

As stated above, the County Court did not pass upon and accept the road. The report relied upon as showing this fact related merely to grades in reference to the grades of surrounding county roads, a uniform system of grading being the particular matter under contemplation. There is nothing in the record to show when the nuisance began, whether the road was a nuisance and obstruction to travel from the start, or whether it became so by use and the action of the elements.

The defense is made upon the latter assumption, and it is presumable that the facts are that way, for otherwise there could be no ground for contest.

The State and defendants both treat the case as presenting only the question of duty to repair, and it will be considered in that aspect.

The doctrine contended for is, that a railroad company, after constructing its road, and having restored those portions of the public highway disturbed, to their former state of usefulness, is under no duty to make any repairs.

The case of *Railroad v. State*, 16 Lea, 800, is

relied on as a conclusive adjudication of this question in favor of defendant; but that case has been expressly overruled at this Term in an opinion by Judge Caldwell in the case of *Dyer County v. Railroad*, 3 Pickle, 712.

In *Louisville and Nashville Railroad Company v. The State*, 3 Head, 524, the following principles, as applicable to the occupancy of public highways by railroads, are stated: "Railway companies are liable to indictment for obstructing a public highway contrary to the powers granted in their act." "The company must so use their own rights as not to injure or take away the rights of others." Pearce on Railroads, page 245, says: "The laying of a railroad across highways often requires excavations and erections, and a greater or less change in the surface. The duty, however, to restore the highway, as far as may be, to its former condition, and to erect and *maintain* structures necessary for such restoration, is presumed to be incumbent on the company, *even without any express requirement imposed by statute.* \* \* \* It is a continuing duty, and binds other corporations which succeed to the ownership or possession of the railroad." To same effect is Mills on Eminent Domain, Section 198.

In a note on page 332, Vol. X., American and English Railway Cases, giving a summary of the decisions on this subject, the following is stated:

"As to the question whether the company is bound to maintain the crossing permanently or not, the current of authority seems to be that it is so



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Railway Company v. State.

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bound. *People v. Chicago and Alton Railroad Company*, 67 Ill., 118; *Ergler v. County Commissioners of Alleghany County*, 49 Md., 257." And this though by a statute the obligation is in express terms only not to obstruct the safe use of the highway.

Where a statute provided that "a railroad shall be so constructed as not to obstruct the safe and convenient use of the highway," the obligation of the company was held not to be limited to the original construction. "It must keep the railroad so constructed at all times. Its obligation so to do is continuing." *Willcome v. Leeds*, 51 Me., 313.

The only case called to our attention holding the contrary doctrine is that of the *M. K. & T. R. R. Co. v. Long*, 6 A. & E. R. R. Cases, 254.

In *Burritt v. City of New Haven*, 42 Conn., 174, it is declared that the charters of corporations which confer exclusive privileges for the particular advantage of the grantees are to be construed liberally for the benefit of the public, and strictly as against the corporations, and that the duty of a railroad company, under its charter, to restore a highway to its former usefulness was not discharged when it restored it to a proper condition at the time the railroad was constructed, but the duty was a continuing one.

The duty to maintain the usefulness of streets under charters which did not, in express terms, impose the obligation to repair was enforced in

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two Minnesota cases, one reported in 36 N. W. Rep., 870, and the other in 39 Same, 154.

In Woods' Railway Law it is stated that "the right to lay a railway track in a public street or highway carries with it the obligation not only to lay it in a proper manner, but also to keep it in repair;" and "if the statute simply provides that the company 'shall restore the highway to its former state of usefulness,' etc., they are invested with a discretion as to the matter, and are not subject to the control of the municipal authorities in this respect, and are liable for the consequences of a failure to discharge this duty, and are also charged with the further duty of keeping that part of the highway in proper condition. In other words, the obligation imposed upon them in this respect is a continuing one, and they must so restore the highway that its use by the public shall not be materially interfered with, and so that it shall not be rendered less safe or convenient, except in so far as diminished safety and convenience are inseparable from its use by the railroad; and the question whether or not the company has discharged its duty is a question of fact for the jury." See Vol. II., Sec. 269, page 970, note 1, and page 976.

In the case of *Dyer County v. Railroad*, 3 Pickle, 712, it was held that where a railroad company makes a cut through a public highway and builds a bridge over its road, the law imposes upon it the continuing duty of repairing the bridge, although its char-

ter did not expressly so require, but simply by its express terms imposed the duty of restoring the highway to its former state of usefulness.

These rules, laid down in respect to steam railway companies, apply not only to the crossings but to the entire road-bed of street railway companies; for their occupation of the street is held not to be a new burden upon the street or a diversion of its use as a highway, for the reason that such occupation is assumed to be entirely compatible with the use by the public. This is based upon the idea that a street railway, properly constructed and maintained, is not an obstruction, though it may be an inconvenience. When it is so constructed or maintained, as to become an obstruction, it ceases to preserve the character upon which its grant of rights in public highways is predicated.

The charter of this company shows that it was intended that the space occupied by it should be used by the public as a highway, the right of way being given to defendants cars. It is its common-law duty to keep the space of the highway occupied by its road-bed (which extends, at least, to the ends of its cross-ties) properly graded and in good repair, so as not to be any obstruction to travel across the road-bed or longitudinally upon it, and also to keep the crossings where its road-bed is traversed by streets in good repair.

The judgment is affirmed, but the fine against the company is reduced to fifty dollars. The cause is remanded for further proceedings, and

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Railway Company v. State.

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defendants are given sixty days from rendition of this judgment to abate the nuisance in accordance with the rule laid down in this opinion; and if they shall fail therein, then the obstructions shall be removed under orders from the lower Court.

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McDaniel v. Adams.

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## McDANIEL v. ADAMS.

(Jackson. June 1, 1889.)

1. SUPREME COURT PRACTICE. *Question not raised below. Omission of jurors' names.*

Where no exception is taken in lower court, it is not reversible error, in a civil case, that the names of only ten jurors appeared in entry of verdict and judgment.

2. STOLEN PROPERTY. *Innocent purchaser's liability.*

Innocent purchaser of stolen property is liable to the true owner for proceeds realized from its sale.

Cases cited and approved: *Bank v. Trenholm*, 12 Heis., 521; *Roach v. Turk*, 9 Heis., 708.

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FROM BENTON.

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Appeal in error from Circuit Court of Benton County.

L. L. HAWKINS and S. W. HAWKINS for McDaniel.

ALVIN HAWKINS and T. C. RYE for Adams.

FOLKES, J. The mule of Adams was stolen, and by the thief sold to McDaniel Bros., who in turn sold it to a stranger. The purchase and sale by McDaniel was in ignorance of the theft.

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McDaniel v. Adams.

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Adams sues McDaniel Bros. in trover for the conversion of the mule, after having made demand for the mule or its proceeds.

There was verdict and judgment for the plaintiff.

Defendants have appealed in error, assigning two grounds of error.

*First.* That no judgment could be entered on the verdict because the record shows only ten jurors composed the jury. There is nothing in this assignment. There is nothing in the record on the subject, except that in the entry of judgment on the verdict the names of only ten persons are given. So far as the record discloses this may have been an error of the Clerk, or the parties may have consented to try with less than a full jury; or in the absence of consent, if a jury of ten were tendered, and the parties had tried the case without objection, this Court would hold, in a civil case, that the parties had waived the right.

*Second.* The defendants asked the Court to charge the jury that if the defendants had purchased and sold the mule in good faith, and in ignorance of the title of the plaintiff, the plaintiff could not recover. The Court refused to so charge, and such refusal is assigned as error.

There was no error in refusing to so charge.

The defendants acquired no title by their purchase from the thief, however innocent they may have been, and their subsequent sale of the property and their refusal to pay over the proceeds

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McDaniel v. Adams.

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thereof to the true owner, upon demand, was a conversion of the property of plaintiff. See *Merchants National Bank v. Trenholm & Sons*, 12 Heis., 521, where it is held that the bank, which had advanced money upon the pledges by a factor of his principal's goods, was liable in trover to the principal, notwithstanding that the goods had been received in pledge, and sold for payment of the factor's debt in good faith, and in ignorance of the true title.

This case is well supported by authority and principle. See Am. & Eng. Ency. of L., Vol. IV., pp. 107-8-9-10, and cases cited.

In *Roach v. Turk*, 9 Heis., 708, overruling *Taylor, Cole & McLeod v. Pope*, 5 Cold., 413, it is said that where the defendant has either the property of another wrongfully taken from the true owner, or the *proceeds thereof*, and refuses to surrender same, it is the assertion of an adverse claim, and constitutes a conversion. It is difficult to see how it is any more of a hardship upon the innocent purchaser of property stolen to be held liable for the proceeds of re-sale, than for the property itself. The withholding of the one is as much a conversion as the withholding of the other.

Let the judgment be affirmed.

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Read *v.* Mosby.

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READ *v.* MOSBY.

(*Jackson.* June 4, 1889.)

ASSIGNMENT OF EXPECTANCIES. *Fraudulent as to creditors of assignor, when.*

Assignment without consideration of his estate in expectancy by an insolvent heir apparent is fraudulent as to his existing creditors, and will be set aside at their instance, and the property descended subjected to payment of their debts.

Cases cited and distinguished: *Fitzgerald v. Vestal*, 4 Sneed, 257; *Steele v. Frierson*, 85 Tenn., 435.

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FROM SHELBY.

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Appeal from Chancery Court of Shelby County.  
B. M. ESTES, Ch.

CRAFT & CRAFT, FRAYSER & SCRUGGS, and S. J. SHEPHERD for Read.

W. P. WILSON for Mosby.

LURTON, J. Complainants are judgment creditors of E. C. Mosby, and have filed this bill, attaching the property described in the pleadings as the property of their debtor, and seek to have their judgments satisfied out of same.



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Read *v.* Mosby.

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The defendant, Mrs. M. F. Mosby, wife of the debtor, claims title to the attached property, which is real estate, by virtue of an instrument executed to her by her husband, and which is in the following words:

“MEMPHIS, TENN., August 20, 1884.

“Know all men by these presents, That I, E. C. Mosby, of Shelby County, Tennessee, for the consideration of the love and affection I bear her, hereby transfer to my beloved wife, M. F. Mosby, all the right, title, and interest which I may hereafter inherit, or that may be bequeathed and devised of the estate of my father, Samuel Mosby, who is also a resident of Shelby County, Tennessee. It is my meaning and intention to place my said wife in my place and stead in respect to my expectancy from my said father's estate after his death, and it is my desire and intention that all interest which I will have in the lands of which my said father shall die seized and possessed shall vest absolutely in my said wife, and she shall have the like right to all personal effects that would be mine; and this conveyance from me to her comprehends the whole title to the lands and right to the personal property, moneys, choses in action, and assets of every nature and description.

“In witness whereof, I, E. C. Mosby, do hereby set my hand and seal the day and year above written.

“(Signed)

E. C. Mosby.”

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Read *vs.* Mosby.

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This paper was duly acknowledged and registered before the death of Samuel Mosby.

The property attached is an undivided interest in real estate which descended to E. C. Mosby from his father, who died intestate in March, 1886. E. C. Mosby was insolvent at the time of his conveyance of this expectancy, and complainants were then creditors by judgment.

The question is whether this conveyance of a bare expectancy by an heir presumptive is operative, when made upon no other consideration than love and affection, to vest such title and interest in the grantee as will defeat creditors of the conveyance who were creditors both when the deed was made and when by descent cast their debtor became seized of the legal title.

For the wife it has been argued by the learned counsel who have appeared for her that the expectancy, when conveyed, was not liable to creditors, and that therefore the grant is not fraudulent within the meaning of the statute of frauds.

The general rule is that, in order to invalidate a gift or other voluntary conveyance under the statute of frauds, the property must be of a kind to which the creditor can resort for payment, for otherwise he is not prejudiced by the conveyance. *Leslie v. Joyner*, 2 Head, 515; *Wagner v. Smith*, 13 Lea, 560; *Adams' Equity*, 147; *Story's Equity Jurisprudence*, 361.

No argument is necessary to establish the proposition that the expectancy of a son in the estate

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Read v. Mosby.

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of his parent is not such a property interest as is the subject of attachment by a creditor during the life of the parent, and complainants do not put their case upon any such absurd ground. In such a case the son has no property right whatever in the estate of the living parent. His hope of an interest upon his death can be denominated by no designation importing any personal interest, and hence is called an expectancy. But if this hope or expectancy imparts no such present interest as can be resorted to by creditors, can it be the subject of such a sale, grant, or assignment during the life of the parent as will operate to vest the title in the assignee when the hope has ripened into an actual interest by descent cast?

At the date of the deed under consideration it is manifest that Mr. Mosby had no title or interest in the property which subsequently came to him by descent; and his deed did not, at the time of its execution, operate to confer upon his wife any title whatever. It does not purport to convey any present interest in possession or remainder or reversion. It is not essential that one should be in the present enjoyment or possession of property in order to validate a conveyance. A vested remainder is as much an estate subject to grant as a fee-simple. So there are future estates which are contingent in which the interest is such that a valid assignment may be made: such as estates depending upon the happening of some uncertain event or limited to some uncertain person, but

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Read *v.* Mosby.

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based upon some existing limitation or conveyance or will. The ordinary contingent remainder or executory devise are examples. "So there are," says Mr. Pomeroy, "a class of interests which are not present existing interests, but which depend upon some executory agreement or contract, and under which the possibility of acquiring future property exists. A Court of Equity will recognize the assignability of such possibility in proper cases, and, upon the acquisition of such property, enforce the agreement as an executory assignment." Pomeroy's Equity, 1286, and cases cited.

Personal property not *in esse* is not the subject of sale, as a general rule. Upon this subject Mr. Benjamin says:

"Things not yet existing, which may be sold, are those which are said to have a potential existence—that is, things which are the natural product or expected increase of something already belonging to the vendor. A man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk that his cows will yield in the coming month, and the sale is valid." 1 Benjamin on Sales, 95.

So the sale of an unborn colt has been held valid and to pass the title to the colt when it comes. *McCarty v. Blevins*, 5 Yerg., 195. So a crop to be raised upon land of the mortgagor is the subject of a valid mortgage. *Tedford v. Wilson*, 3 Head, 312; *Polk v. Foster*, 7 Bax., 98.

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“But,” says the author just quoted, “*he can only make a valid agreement to sell, not an actual sale*, where the subject of the contract is something to be afterward acquired, as the wool of any sheep, or the milk of any cow, or any goods to which he may obtain title within the next six months.” *Ibid*, 96.

Upon this ground a mortgage upon a stock of goods out of which the conveyor is to sell and replenish, the mortgage to attach to new goods as acquired, is void. *Bank v. Ebbert & Co.*, 9 Heis., 153; *Bank v. Haselton*, 15 Lea, 217.

A seeming exception to the latter rule is the case of a mortgage by a railroad company of all its rolling stock then owned, as well as such as it might afterward acquire. Such a mortgage has been held to give to the mortgagee a prior lien on such property *only when the mortgage had been so far executed that the after-acquired property had actually come to the possession of the mortgagee*. *Clay v. E. T. & Va. R. R.*, 6 Heis., 421.

This was clearly upon the doctrine that such a mortgage was only an executory agreement, and its validity only upheld, as suggested by Chancellor Cooper in *Phelps v. Murray*, 2 Tenn. Chancery Reports, 753, upon the ground of the public interest involved in the enforcement of such contracts.

Lower than any of the property interests we have been considering is a mere expectancy, not based on any existing contract, deed, limitation, or will, such as the mere hope or expectation

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Read *v.* Mosby.

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of a child that it will inherit from a living parent.

At law a deed conveying such a bare future expectancy in real estate is held absolutely void, and for the reason that there was no title or property interest upon which it could operate. Speaking of the effect of such a grant, Professor Washburn, in his learned work upon the law of Real Estate, says:

“But every right is not the subject of a grant, though it relates to land or an interest therein. Thus a bare possibility of an interest which is uncertain is not grantable, though a possibility, coupled with a present interest, may be granted. It has accordingly been held that a grant by an heir apparent of an interest in his ancestor’s estate, so long as his ancestor is living, conveys nothing, and is inoperative. But when an heir apparent, who was indebted to another, assigned his interest in his ancestor’s estate, with a power of attorney to make all deeds, etc., necessary to receive the proceeds, it was held to give him such an interest that equity protected it against the claims of a creditor of the heir who attached the estate at the ancestor’s death. \* \* \* It must be an interest in the land existing in possession, reversion, remainder, by executory devise, or contingent remainder.” 3 Washburn on Real Estate, bottom page 636.

To the same effect is the opinion of the editor of the note to the seventh edition of Smith’s Lead-

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Read v. Mosby.

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ing Cases, Vol. I., 829, who cites a large number of cases as supporting the view we have expressed as to the effect of such a grant, considered apart from the effect which might result from covenants of seizin, further assurance, or of warranty.

There is much conflict in the authorities as to the operation of covenants of warranty in estopping the grantor under such a deed, and some cases have gone to the extent of holding that by operation of such covenants the estate would pass when acquired. White & Tudor's Leading Cases in Equity, 4th Ed., Vol. I., 829, and cases cited; 3 Wash. on Real Estate, bottom page 636, 637, and cases cited.

It is unnecessary to consider what would be the effect at law of such a covenant, for the reason that the grant under consideration contains no covenants of any sort. It would seem, however, that if the title should pass when acquired, as an effect of an estoppel upon the grantor, that creditors of the grantor would not be estopped to assail the deed as fraudulent under the statute of frauds. In such case the title would descend to the heir, and if the heir's covenant should operate to *then* convey the title to the grantee, such conveyance, *being operative only from the time of seizin by the heir*, would be a conveyance of an interest which could have been resorted to by the creditor, who would not be estopped to show that the deed was void as to him.

If the conveyance had been upon a good con-

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Read *v.* Mosby.

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sideration, this instantaneous seizin by the debtor might be insufficient to have fastened a judgment lien upon the land or to justify a court of equity in subjecting the title to a creditor. *Birdwell v. Cain*, 1 Cold., 301; *Gregg v. Jones*, 5 Heis., 458.

But while such a grant is clearly void at law, yet in certain cases such assignments are by courts of equity protected and enforced. Whether enforced upon the theory so strenuously advocated by Mr. Pomeroy in his very able work upon Equity Jurisprudence, that such a conveyance is an equitable assignment of a present possibility, which changes into an assignment of the equitable ownership as soon as the property is acquired by the grantor, or as a mere executory agreement, which will be specifically enforced by a legal conveyance and delivery of the property when acquired, can make little difference, save in cases where a specific performance is resisted by the grantor. In any view of it, the right acquired by the assignee of such an expectancy is one only cognizable and enforceable in equity. 3 Pom. Eq. Jur., Sec. 1288. Nor will a court of equity protect or enforce such a contract unless it be altogether such a one as appeals to the equitable consideration of a court. The consideration upon which it rests ought to be rigidly scrutinized, and all the purposes and circumstances of its execution inspected and considered. Such contracts are not, and ought not to be, favored in equity, even as between the parties to the agreement.



Concerning such agreements Sir John Strange, in the case of *Chesterfield v. Jansen*, said :

"The courts keep a strict hand over these agreements, which must, indeed, all stand on their own particular circumstances; and perhaps it is not advisable to lay down any general rule about them or more than is necessary to the relief of each particular case." 2 Vesey, 125.

In the same case Lord Hardwicke, in considering the evils likely to result from such assignments or debts created upon the credit of such expectations, said :

"In most of these cases have concurred deceit and delusion on other persons not privy to the fraudulent agreement. The father, ancestor, or relative from whom was the expectation of the estate has been kept in the dark; the heir or expectant has been kept from disclosing his circumstances and resorting to them for advice, which might have tended to his relief and also reformation; this misleads the ancestor, who has been induced to leave his estate not to his heir or family, but to a set of artful persons who have divided the spoils beforehand." *Ibid.*

The case of *Fitzgerald v. Vestal*, 4 Sneed, 257, has been cited by counsel for appellant as sustaining her contention that the interest assigned was not one subject to creditors. The case, on its facts, is to be readily distinguished from this one. The learned judge, in the course of his opinion sustaining the assignment as against an attaching

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Read *v. Mosby*.

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creditor, did say that, even if the sale had been made for the purpose of defeating creditors, it was the transfer of a property which the creditor could not reach. This was a clear inadvertance, for the case called for no such announcement, for the opinion expressly states that there was no evidence to support the charge that the sale had been made to defeat creditors. Upon the contrary, the opinion finds that the assignment was for money advanced at the time and with the consent and approval of the ancestor from whom the expectancy was to come, and that he was indeed willing, and proposed to give the shares of the vendors, by will, to purchasers, but being advised that he could not do that, then agreed to make his will as he had before determined to do, so that the assignors should take the interest which they, with his approval, had sold.

In the case of *Steele v. Frierson*, 85 Tenn., 435, we had occasion to pass upon a similar assignment. The transfer in that case was to pay a surety who, for the assignor, had been compelled to pay a very large sum. The debt was a highly meritorious one, and the assignment was in the most absolute good faith, and it was therefore upheld by this Court.

The assignment, under which Mrs. Mosby claims, was made by an insolvent debtor, and whether so intended or not, it operates in law as a fraud upon his creditors. It was not made for a valuable consideration, and is nothing but a settlement

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Read v. Mosby.

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made upon the wife by a husband unable, with justice to his creditors, to make such a conveyance. Under these circumstances a court of equity cannot protect or enforce such a grant as against creditors whose debts were in existence, either at the date of the deed or at the time the grantor, by descent, became seized of the title to the property sought to be conveyed.

The decree of the Chancellor, subjecting the property to the satisfaction of complainants' debt, must be affirmed.

The case of Sarah A. Smithwick against the same parties and presenting a similar question was heard with this, and a like decree will therefore be entered affirming the decree of the Chancellor in that case.

Judge Folkes, having been of counsel, did not sit upon the hearing of this case.

Special Judge W. M. Randolph, who sat in his place, does not concur in the conclusion reached.

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 Boyd v. Sims.
 

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BOYD v. SIMS.

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(Jackson. June 6, 1889.)

1. CHANCERY PLEADING AND PRACTICE. *Decree overruling demurrer conclusive on Chancellor.*

Decree overruling demurrer to a bill cannot be reconsidered or reversed by the Chancellor, after answer has been filed and proofs taken, at the hearing at a subsequent term upon the merits.

(See Code (M. & V.) §§ 5062, 5063, and notes.)

2. CORPORATIONS. *Suit by stockholders for redress of grievances.*

Before suit for redress of grievances will be entertained on behalf of stockholders against the corporation, its directors, or officers, the stockholders must have exhausted all the means within their reach to obtain redress within the corporation itself, and must aver that fact.

Cases cited and approved: 104 U. S., 450; 110 U. S., 209.

3. SAME. *Same.*

The fact that the defaulting directors or officers of the corporation have a pecuniary interest adverse to that of the complaining stockholders, if averred, does not excuse the failure to aver a proper effort by the stockholders to obtain redress of the corporate authorities.

Cases cited: Deadrick v. Wilson, 8 Bax., 131.

4. SAME. *Same.*

Stockholders cannot maintain suit against a third party for damages caused to the corporation by his misconduct, unless they have first requested the corporation to sue and it has refused to do so.

Cases cited and approved: 104 U. S., 482; 9 Heis., 314.

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 FROM SHELBY.
 

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Appeal from Chancery Court of Shelby County.  
B. M. ESTES, Ch.

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Boyd v. Sims.

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MALONE & MALONE and L. & E. LEHMAN for Complainants.

POSTON & POSTON for Respondents.

SNODGRASS, J. Complainants, holders of a minority of the stock of the Arlington Insurance Company, of Memphis, filed this bill against Sims and Kennedy, the President and Secretary of that company, as well as of the Citizens' Insurance Company, the two companies named, and other defendants, stockholders and Directors of the Citizens' Insurance Company, some of whom are also Directors of the Arlington Insurance Company, though they are not alleged to be, and do not in fact constitute, a majority of the Board of Directors of that company.

The bill alleged the incorporation of the Arlington in 1883, and the subsequent incorporation of the Citizens', a rival company, in 1886; that the President and Secretary of the first had been made President and Secretary of the second company; and that five of the Directors of the former were Directors in the latter—had, with two others, organized the latter company as original incorporators. It showed that the latter, though a rival company, had taken possession of the office of the Arlington, on payment of alleged inadequate rent; had taken business from it improperly and on inequitable terms; had obtained the benefit of its funds applied to the salaries of officers, by securing them at

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Boyd v. Sims.

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lower terms than they could have been obtained if the Arlington had not paid them higher salaries for like service in the same office; and made a *prima facie* case of gross misconduct in the management complained of, against which it sought an injunction as well as an account for damages sustained by the contract and operation of the Citizens' Company.

The bill alleged that complainants "have repeatedly protested to the *said defendants* against this course of business, pointing out its inconsistencies; \* \* \* but, being imbued with the spirit of rule or ruin, the protests have been disregarded."

The bill does not allege any direct application to even the officers, much less the Directors of the company, to correct the evils complained of. It does not pretend that a majority of the Directors of the Arlington Company have any official connection with the Citizens' Company, and shows no sufficient effort, nor indeed any effort, to have the majority of the Board of Directors of the Arlington redress the grievances complained of within the company, or to bring any suit for the relief desired against the other company. Both companies demurred, and assigned as grounds of demurrer the failure of complainants to aver such effort and demand, with refusal or failure to comply on the part of the Arlington Company through its Directors.

The demurrers were overruled, answers filed,

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Boyd v. Sims.

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proof taken, and the cause brought to trial on the merits.

The Chancellor, on this hearing, concluded he was in error in overruling the demurrer, and reversed his former action and dismissed the bill.

We are of opinion that the Chancellor, in assuming the right to redetermine the question on the demurrer, was in error. If a demurrer is overruled, without leave to rely on it in the answer, as was this, so far as the question involved in it is concerned, it should be treated by the Chancellor as settled, and the cause heard and decided on the merits as prepared for hearing by the parties; and even where leave has been given to rely on a demurrer in answer, it is error to act on it on final hearing, the advantage of it being lost and the demurrer waived, unless it is disposed of before the cause is heard on the merits. This has been so often determined it is not necessary to refer to cases. We only notice this question here, however, to settle it and avoid its recurrence in practice, because, so far as this cause is concerned, the effect is of no practical consequence, inasmuch as on appeal the original action on demurer is before us for review; and as we hold the decree overruling it to be erroneous, the result is the same. It would not be the same, however, in cases where we affirmed such a decree, which the Chancellor had subsequently reversed, for in that event the record here would

present no other—no final decree on the merits for review.

When parties, after a demurrer is finally overruled, have put their cause at issue, and gone to the trouble and expense of taking the proof necessary to present the merits of the controversy for determination, they are entitled to have it so determined, and such decree submitted to this Court for review with all others, on demurrer or otherwise, which are open to revision on appeal.

Having stated that the demurrer in this case was well taken, it is not deemed necessary to go into any thing like an elaborate discussion of the question presented in the demurrer. It is one of obviously correct solution. A corporation acts as a body. All stockholders in it submit the control of their interests to it as such, through its Trustees or Directors. In the event its officers so use the powers conferred upon them as, in the judgment of stockholders, to injure the corporation, they can demand of the power which they have constituted to do so—the Directors or Trustees—to put a stop to the abuses complained of. This calls upon them to exercise the judgment they are expected to exercise to determine the propriety of the acts objected to. If they think the acts proper, and approve them, or refuse or fail to take any action, the stockholders, if a majority, may themselves take such action as is necessary to correct the abuses by change of Directors and officers or otherwise, including, of course, an appeal to the Courts; if



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a minority, by suit to compel the proper discharge of trusts and official duties. But it is clear that no stockholders should be permitted to interfere and control the management or frustrate the purposes of the corporation merely upon an allegation of the existence of a state of affairs contrary to their judgment of propriety, without any effort to have it changed in the mode indicated. Any other view would be destructive of the purposes for which corporations are formed, and of the principle of corporate action and management. It would make them hot-houses of litigation, and leave the valuable franchises held by them at the mercy of the misjudgment, passion, or speculative propensities of individual stockholders, while the rule announced neither permits abuses in this or the opposite direction. It does not prevent suits for abuse of trust or mismanagement. It only requires that stockholders proceed in that lawful and orderly way for the correction of abuses within the corporation which they have engaged to do on becoming shareholders in it, which its existence and interest require they shall do—to reform alleged abuses before involving the corporation and other shareholders therein in litigation; but it equally provides that when they have done this, and found themselves unable to obtain relief to which they are entitled, it will be given them by the Courts.

This rule is not only sound in reason, but unquestioned in authority.

*Hawes v. Oakland*, 104 U. S., 450; *Dimpfel v. Railroad Company*, 110 U. S., 209.

It is argued, however, that because of the allegation quoted that complainants have repeatedly protested against the evils complained of, the rule should not be applied in this case. We need not say that such a construction would destroy it, and that if mere complaint or protest—not even averred to have been made to the Directors as a body, or to the majority of them—unaccompanied by any specific effort, addressed to parties authorized to afford it, to obtain redress, would justify a suit, then the only attitude in which one need stand to sue the corporation for mismanagement would be that of a complaining stockholder.

The objection to suit by its stockholders against the Arlington, for the reasons stated, applies with more force to the suit by stockholders of the Arlington against the 'Citizens' Company. Whatever injury the latter company has done was done the former company, as such, and not the individual stockholders complaining. Of course these cannot maintain a suit against the Citizens' Insurance Company for alleged injury to the Arlington without this latter corporation has been asked to sue, and refused or failed to do so.

*Huntington v. Palmer*, 104 U. S., 482; *Gas Company v. Williamson*, 9 Heis., 314, 338-9.

If this were not the rule a corporation might be sued by any or every stockholder of another

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who considered that the latter was aggrieved by the acts of the former.

But it is said that because it is alleged in the bill that "all or nearly all of the Directors in the Arlington (except complainant Boyd) were much more largely interested in the Citizens' Insurance Company than in the Arlington," this case is brought within the exception established by some of the cases to the effect that a demand of the agents of a corporation in whom authority to bring and direct its litigation is vested, is not necessary, if these agents are themselves guilty of the wrongs complained of against the corporation; that it would be contrary to justice to permit the authors of the wrong to conduct the litigation against themselves, as agents of the injured party. 1 Mor. on Corp., § 242, citing *Deaderick v. Wilson*, 8 Bax., 131-2, and other cases.

The reference to the 8th Baxter case is to a discussion rather than a decision, for this point did not go to judgment there, but conceding the exception to be sound, the facts alleged do not bring this case within it.

Here the majority of the Directors of the Arlington were not Directors of the Citizens', and were not alleged to be. They are not, then, the body doing the wrong, or the agents and authors thereof.

The bill can be given no greater effect than as showing that the minority of the Directors of the Arlington are Directors of the Citizens' Insurance

Company, and that others of these Directors are more largely interested in the latter than in the former company, but it does not follow from this fact that they would, upon demand, refuse to discharge their duties as Directors in the reformation of abuses and the bringing of necessary suits, unless it is upon the assumption that men will never discharge duties inconsistent with their pecuniary interests, an extent to which we cannot go, and to which no doctrine has ever been carried but that of total depravity.

It must be inferred, then, in the absence of demand and refusal by them, that the Directors composing the Arlington Board, a majority of whom are not Directors in the Citizens' would, if called upon, bring any suits against the other corporation necessary to right the wrongs of the one whose Directors they are, and this though they, or some of them, may have stock in the Citizens' Company equaling or in excess of that which they hold in the company of which they are Directors.

● It follows that the bill should have been dismissed, and it is so ordered.

On the question of costs in the Chancery Court, it is assigned as error that the Chancellor decreed the costs of preparing certain exhibits filed by respondents, and the stenographer's fees for taking same, against the complainants. The record shows the Chancellor did not do this, although he was of the opinion that such was the effect of the decree for costs; and this opinion he expressed in

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the order refusing to tax these items specially. We cannot correct the opinion of the Chancellor, even if erroneous, unless it is decreed. The decree does not adjudge this question, and it is not before us.

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## NELSON v. HAYWOOD COUNTY.

(Jackson. June 7, 1889.)

1. CONSTITUTION. . *Bonds. Enabling Act annulled by new Constitution.*

Chapter 50, Acts 1869-70, Sec. 8, empowering Haywood County to issue bonds in aid of railroad construction upon a *majority* vote was annulled by Art. 2, Sec. 29, Constitution 1870.

Cases cited and approved: Norton v. Commissioners, 129 U. S., 479; Aspinwall v. Commissioners, 22 How., 374.

2. SAME. *Same. Contract to issue made before adoption of Constitution.*

If the power to issue bonds under the enabling Act has not been exercised, and no binding contract has been made to issue them before the annulling Constitution goes into effect, then the exercise of such power thereafter is unauthorized and void; but if such contract has been made anterior to the adoption of such Constitution, bonds delivered in pursuance of such agreement, subsequent to such adoption, are valid.

Cases cited and approved: Wadsworth v. Supervisors, 102 U. S., 534; Railroad Co. v. Falconer, 103 U. S., 826; Town of Concord v. Savings Bank, 92 U. S., 630; County of Moultrie v. Savings Bank, 92 U. S., 635.

3. STOCK SUBSCRIPTION. *Manner of.*

No actual manual subscription on the books of the company is necessary. A resolution by the County Court to subscribe, and a present acceptance by the company of such subscription, is binding and complete, although it was ordered that the Chairman of the County Court should subscribe upon the books of the company.

Cases cited and approved: County v. Gillett, 100 U. S., 594; Nugent v. Supervisors, 19 Wall., 247; County of Moultrie v. Savings Bank, 92 U. S., 634.

4. RAILROAD. *Bonds. Stock. Contract. Constitution.*

Section 8 of Chap. 50, Acts 1869-70, empowering Haywood County to *issue bonds in aid of railroad construction*, authorized, by implication, the county to subscribe for stock, to be paid for by said bonds, and the county having voted to issue the bonds therefor, and the County Court

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having agreed to subscribe for the stock and to issue the bonds, and the railroad company having accepted such subscription and agreement to deliver the bonds, all of these things having been done before the Constitution of 1870 went into effect, such rights became vested as could not be affected by the new Constitution, and the bonds delivered after its adoption are valid.

5. BONDS. *Donation. Contract. Constitution.*

If a donation of bonds be authorized, and it is the duty of the County Court to issue the bonds upon a favorable vote, and an agreement is made by the County Court to issue the bonds, which is accepted by the railroad company, and the bonds are issued in pursuance of such agreement, though after the adoption of the annulling Constitution, they are valid in the hands of an innocent purchaser.

Cases cited and approved: *Livingston County v. Portsmouth Bank*, 128 U. S., 126; *Town of Concord v. Savings Bank*, 92 U. S., 630.

6. ELECTION. *Irregularity. Innocent purchaser.*

Where the power is given to a county to issue bonds upon a favorable vote, and the County Court is charged with the duty of ordering the election, determining the result, and issuing the bonds, and it issues the bonds, reciting the Act authorizing them, and pays interest on them for fifteen years, an irregularity in the election notice cannot be set up against an innocent purchaser.

Cases cited and approved: *Town of Coloma v. Eaves*, 92 U. S., 484; *Humboldt Township v. Long*, 92 U. S., 642; *Dixon County v. Field*, 111 U. S., 94; *Anderson County v. Beal*, 113 U. S., 238; *County of Moultrie v. Savings Bank*, 92 U. S., 636; *Livingston County v. Portsmouth Bank*, 128 U. S., 127.

Cited and distinguished: *City of Attica*, 56 Ind., 477.

7. BONDS. *Conditions. Innocent purchaser.*

If the county, in its contract for issuing the bonds, imposes conditions other than those fixed by the Legislature, which are to be complied with by the railroad company, before the bonds are to be delivered, it cannot assert, as against an innocent holder of such bonds, that its officer charged with the duty of passing upon the fulfillment of the conditions and of delivering the bonds, issued them without the conditions being complied with.

Cases cited above.

8. SAME. *Interest. Constitution. Usury.*

Bonds issued pursuant to an Act authorizing them to bear interest lawful at the place where they are payable are not usurious on their face,

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if the interest contracted for was lawful at the place of payment, though it be in excess of the rate allowed in this State; and such a law is not a partial law, and is constitutional.

Case cited and distinguished: McKinney v. Overton Hotel, 12 Heis., 104.

9. SAME. *Consolidated road.*

Where an Act authorizes the issuance of bonds to one road upon twenty days' notice of election, and after the notice has begun to run and before election day, an Act is passed authorizing the issuance to a consolidated road, the bonds issued to such consolidated road are valid.

Case cited and approved: Livingston County v. Portsmouth Bank, 128 U. S., 115.

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FROM HAYWOOD.

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Appeal in error from Circuit Court of Haywood County. January Term, 1889. W. H. SWIGGERT, J.

J. R. FLIPPIN, W. H. RUTLEDGE, SPL. HILL, and TURLEY & WRIGHT for Nelson.

A. D. BRIGHT, J. R. BOND, J. W. E. MOORE, and METCALF & WALKER for Haywood County.

J. M. DICKINSON, Sp. J. This is a petition for a *mandamus* to compel the county of Haywood to levy a tax to pay coupons upon bonds issued under Section 8, Chapter 50, Acts 1869-70, which reads as follows:



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*"Be it further enacted,* That the County Court of Haywood County is hereby authorized, upon application of the President of the Brownsville & Ohio Railroad Company, to order an election in said county, to be held by the proper officers, for the purpose of ascertaining the sense of the voters of said county as to the issuance of county bonds in aid of the construction of said railroad, said election to be advertised at least twenty days in all the voting places in said county; and if a majority of all the votes cast shall be in favor of the issuance of said county bonds, then it shall be the duty of said Court to issue the same; but if there should not be a majority of the votes cast in favor of the issuance of said bonds, then said Court shall not issue them—the amount of said bonds not to exceed two hundred thousand dollars, and to run not exceeding twenty years, bearing the rate of interest allowed by law at the place where said bonds are made payable."

The Act was passed February 8, 1870, and upon the following day an order was made by the Quorum Court in pursuance of said Act, and in accordance with its terms, ordering an election to be held on the first Saturday in March, 1870. The election was held on that day, and a majority of the votes was cast in favor of the issuance of the bonds.

The return of the officer holding the election recited that, in obedience to the said order of the Court, he held the election, previous notice of the

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time and places and purposes of said election having been given, "said election being opened and held, as aforesaid, in pursuance of said order, for the purpose of ascertaining the sense of the qualified voters of said county as to the issuance of one hundred thousand dollars of eight per cent. county bonds, payable at St. Louis, Mo., within twenty years from the date of issuance by said Haywood County, to be subscribed as stock to and used in aid of the construction of the Brownsville and Ohio Railroad; and said qualified voters were instructed by said notice that those who were in favor of the issuance of said bonds should have written or printed upon their ballots or tickets 'Bonds,' and those who were opposed to the issuance of said bonds should have written or printed upon their ballots or tickets 'No Bonds.'"

On the 4th day of May, 1870, the County Court of Haywood County, after reciting its previous order, under said Act, for an election, and the result of the vote, proceeded as follows: "It is therefore ordered and decreed by the Court that the Chairman of this Court be and he is hereby authorized, empowered, and ordered, in the name of Haywood County, to subscribe upon the books of said Brownsville and Ohio Railroad Company stock to the amount of one hundred thousand dollars, to be paid or liquidated by said county by the issuance to said company of one hundred thousand dollars Haywood County coupon bonds, payable twenty years after date of issuance at the city of

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St. Louis, Mo., and bearing interest from date at eight per cent. per annum, and payable annually; said bonds to be used by said company in aid of the construction of said Brownsville and Ohio Railroad. And the said Chairman of the Court is ordered to sign and issue to the said Brownsville and Ohio Railroad Company said bonds, with coupons attached, upon application of its President, upon the following conditions, to wit:

“*First.* That said railroad company shall take said bonds at a par valuation, and shall issue for the same, to said county, certificates of stock in said company, equal in amount to the amount of bonds received hereunder, which said certificate or certificates of stock shall entitle the holder or holders thereof to all the rights, privileges, benefits, and immunities conferred upon other stockholders in said company.

“*Second.* Before said bonds are issued, the said Brownsville & Ohio Railroad Company shall exhibit to said Chairman such an amount of *bona fide* and solvent stock, subscribed in Haywood County, as will be sufficient, in addition to three-fifths of the one hundred thousand dollars herein ordered, to prepare the road-bed of said railroad for the iron and rolling stock from Brownsville to the Dyer County line.

“*Third.* Said bonds not to be issued before May 20, 1870.

“And thereupon came into open Court J. D. Smith, President of said Brownsville & Ohio Rail-

road Company, having been thereunto previously authorized by the Board of Directors of said Company, and accepted, in the name of said company, the one hundred thousand dollars of county subscription herein ordered, and the issuance of said county bonds upon the conditions herein imposed."

Upon the following day, May 5, 1870, our present Constitution went into effect.

Article II., Section 29 provides: \* \* \* "But the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city, or town become a stockholder with others, in any company, association, or corporation, except upon a like election, and the assent of a like majority."

Under an Act passed February 17, 1870, which was sixteen days before the election, and after the notice for said election, which required twenty days, began to run, the Brownsville & Ohio Railroad Company became consolidated with the Brownsville & Holly Springs Railroad Company, under the corporate name of Holly Springs, Brownsville & Ohio Railroad Company. This had in view the building of a line from a point in Kentucky, by way of Brownsville, as contemplated by the first company, and continuing to Holly Springs, in the State of Mississippi.

The consolidation took place, and the said bonds were issued to the consolidated company, after the Constitution of 1870 went into effect.

Petitioner avers that the county of Haywood has, for more than fifteen years, recognized the validity of the bonds by levying, assessing, and collecting a tax to pay the interest coupons, which have been regularly redeemed up to the year 1886, and that some of the bonds have been paid by the county. She further avers that she is the owner and holder, for a valuable consideration, in due course of trade, before maturity, of the coupons described in the petition, which were a part of said issue of bonds, and that the county of Haywood refuses to pay the same, and to levy any tax for that purpose, as it is in duty bound under the law to do.

The questions to be determined by us are raised by demurrer, the grounds insisted on being:

*First.* That the power to issue the bonds was abrogated, by the Constitution of 1870 going into effect, before it was exercised under the enabling act, and that the bonds reciting upon their face the act under which they were issued, and being issued April 7, 1871, affected all holders with the infirmities existing in them by the effect of the present Constitution.

*Second.* That the Act only authorized their issuance to the Brownsville & Ohio Railroad Company, and therefore the issuance to a consolidated company, formed by virtue of a law which did

not go into effect until after eight of the required twenty days' election notice had run, was unauthorized and void.

*Third.* That the Act authorizing the issuance of bonds bearing interest at the rate allowed by law at the place where they were made payable was, for that reason, unconstitutional.

*Fourth.* That the bonds bearing eight per cent. interest on their face are usurious, and no suit can be predicated upon them.

It is claimed by the county, and it is unquestionably the law, that the Constitution of 1870, which went into effect on the fifth day of May, 1870, abrogated and annulled the Act of February 8, 1870, authorizing the county of Haywood to issue the bonds in question. Constitution of 1870, Art. 2, Sec. 29; *Norton v. Commissioners, Etc.*, 129 U. S., 479; *Aspinwall v. The Commissioners*, 22 How., 374.

This general principle is so well settled and so generally recognized as to make a further citation of authorities unnecessary.

If the power has not been exercised, and no binding contract or agreement has been entered into before the annulling Constitution goes into effect, then the exercise of such power thereafter is unauthorized and void. *Wadsworth v. Supervisors*, 102 U. S., 534; *Railroad Company v. Falconer*, 103 U. S., 826; *Town of Concord v. Savings Bank*, 92 U. S., 630; *County of Moultrie v. Savings Bank*, 92 U. S., 635.

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No case has been cited, holding that the power to issue bonds or make a subscription, exercised after the annulling law went into effect, was extinct and the act thereunder void, which is not unconditionally based upon a state of facts showing either, that the right to exercise such power did not accrue, or that no agreement, competent to be made, to exercise such power, had been entered into, before such repealing law went into effect.

In *Aspinwall v. Commissioners*, 22 How., 375, the Court says that the charter of the company provided "that it *should be lawful* for the County Commissioners, through which the road passed, to *subscribe for stock* on behalf of the county at any time within five years after the opening of the books of subscription, if a majority of the qualified voters of said county, at an annual election, shall vote for the same." The vote was had authorizing the subscription, but no subscription was made before the new Constitution took away the power. The Court held that, until the subscription was made nothing was binding, and therefore no rights could have vested before the power to subscribe was taken away. The vote only clothed the Commissioners with a power, and this power had never been exercised before it was taken away.

In *Concord v. Savings Bank*, 92 U. S., 629, the act authorizing a vote upon "a proposition to appropriate moneys" to "aid in the construction" of

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a railroad, the Court held that the mere vote was not an appropriation, and that "the town was not authorized to make it, until the railroad was located and constructed through the town." The vote was taken authorizing the appropriation, but by the terms of the act, as construed, this was a mere authorization to make an appropriation, after something had first been done. Before the road was located and constructed the power to appropriate was taken away. The Court said, "we do not say that the new Constitution could annul or impair any contract that was made between the the town and railroad company, *during the time in which the town had authority to make it.* \* \* \* \*

The town voted, on the 20th day of November, 1869, *that it would make a donation*, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation. *But the town was not empowered to make the donation until the road was located and constructed through the town.*"

No such condition upon the exercise of the power to issue or contract to issue the bonds by Haywood County existed; but the Act says "if a majority of all the votes cast shall be in favor of the issuance of said county bonds, *then it shall be the duty of said Court to issue the same.*"

In *Wadsworth v. Supervisors*, 102 U. S., 534, the Act declared that "if a majority of the ballots cast in any of said counties be for railroad aid, *the County Board of Supervisors of said counties*



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*shall have power, by resolution, to cause to be issued bonds," etc.* The Act authorizing the levy of taxes to pay the interest on said bonds was repealed, and the Supervisors thereafter refused to issue the bonds. The Court held that, in this case there was "*no binding agreement or contract*" between the railroad company and the county, by which the county became legally bound, through its Board of Supervisors, to execute and deliver the bonds, and that the Act, "neither in express terms nor by necessary implication, made it imperative upon the Board of Supervisors to issue bonds in pursuance of the popular vote. \* \* \* As the statute only declared that the Supervisors should have power, by resolution, to cause bonds to be issued when the people voted in favor of railroad aid, we are not at liberty to say that the Legislature meant such vote to be a positive command to exercise that power, without regard to the circumstances arising after the expression of the legislative will."

The Court further says that, admitting that it was a positive mandate, yet it could be revoked by the Legislature at any time "*before the bonds were in fact issued, or before the county came under legal obligation to issue them.*" And again it says that the Supervisors did not, prior to the repealing of the Act, "assume to impose any legal obligation upon the county, either by an actual issue of the bonds or *by an agreement to issue and deliver them upon the completion of the road through the County.*"

In *R. R. Co. v. Falconer*, 103 U. S., 821, the law prescribed that the petition of the tax payers authorizing Commissioners to subscribe for stock might be conditional, and that the condition would bind the railroad company. The petition contained the condition that the subscription should not be made until the railroad had located and constructed its road to a designated point. The railroad was not constructed until after the Act was repealed by the new Constitution. The Commissioners undertook to make an agreement to subscribe before the condition precedent to the vesting of any right in them to make a subscription had happened, and it was held that the bonds issued in pursuance of such *ultra vires* act were void. The Court held that all that was done by the town was, to "appoint agents for making a subscription and issuing bonds on the happening of a certain event." That what had not been done before the revoking constitutional amendment went into effect could not be done afterward, "unless some valid contract required it to be done. But as we have shown, no such contract existed in that case." The Court distinguished this case from *County of Moultrie v. Savings Bank*, 92 U. S., 631, showing that in that case there was "*authority to make a present subscription, and that the resolution amounted to a subscription, or at least to an agreement to subscribe, which, being accepted and acted upon by the railroad company as such, created a contract between the county and the company.*"

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All of these cases, except the last, are cited and relied on by defendant, and therefore they have been commented upon at length. They do not establish that the delivery of bonds, made either under an Act authorizing a subscription or one authorizing a donation, is void, because they are delivered after the annulment of the enabling Act, but that this is true, only in the event that the right to have the bonds delivered had not vested, either by the effect of the Act or by virtue of a valid contract made under it before it became void. In *County of Moultrie v. Savings Bank*, 92 U. S., 631, the Act provided that the Supervisors were authorized to subscribe for stock and issue bonds therefor; "*provided, that the same shall not be issued until the road shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid.*"

The Court held that the power to subscribe was not fettered by conditions, but that only the payment was postponed until the railroad should be opened, and, "as a greater power includes every constituent part of it, the legislative Act empowered the Board of Supervisors to *agree to subscribe preparatory to an actual subscription.* The power thus granted was never revoked, unless it was by the new Constitution of the State, which did not take effect prior to July, 1870. *Whatever was done in pursuance of the power before that time, if any thing was done, could not be affected by the Constitution subsequently adopted. Subscriptions or*

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*contracts to subscribe*, made in pursuance of it before it was abrogated, remain binding."

In that case the Board of Supervisors informally resolved to subscribe, and the resolutions were referred to a lawyer to be put in form, and subsequently were entered by the Clerk upon the records. It provided that "the County of Moultrie subscribed," and that when the railroad "shall be open for traffic" between the city of Decatur and the town of Sullivan aforesaid "there be issued bonds," and that said bonds be delivered to said railroad company in full payment of the subscription of said county, so made as aforesaid. There was no further subscription. None was made on the books of the company. The Court says, "a subscription on the books of the company was unnecessary, for that which amounted to a subscription had been made in December, 1869." "The resolution to subscribe was its own act—its immediate subscription." On the point that an actual subscription is not necessary the Court cites authorities. (Page 634).

The opinion proceeds:

"And if this conclusion could not be reached it would make but little difference to the present case; for it could not be doubted that the action of the Board *was at least an undertaking to subscribe*, and this was assented to or accepted by the railroad company. The resolutions were entered of record by the Clerk and President of the railroad company, and the company made an appropriation

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of the bonds to be received in payment for the subscription, by a contract made on the 15th of April, 1870. In either aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new Constitution came into operation. *No matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the Constitution. The delivery of the bonds was no more than performance of the contract.*"

The resolutions of the Haywood County Court ordered the Chairman to subscribe upon the books of the company for stock to be paid for by the bonds voted for, and to issue the bonds to the President of the company after the company had complied with certain conditions, which are set out in full in the first part of this opinion. The delivery was not conditioned upon the Chairman first subscribing on the books, but upon things to be done by the company, and not by the Chairman. No time is fixed for the subscription to be made on the books, and it manifestly was intended as a merely formal act in pursuance of what the order of the Court and the acceptance by the company, based upon the vote of the people, had already accomplished. That the Court understood that the subscription was then consummated, is evidenced by the fact that, the same order authorizing it, recites that the President of the railroad company thereupon came into open Court, "having been

thereunto previously authorized by the Board of Directors of said company, and *accepted, in the name of said company, the one hundred thousand dollars of county subscription herein ordered, and the issuance of said county bonds upon the conditions herein imposed.*"

The contracting parties evidently understood that the act of subscription was then and there consummated. No actual manual subscription on the books of the company was necessary. *County v. Gillett*, 100 U. S., 594; *Nugent v. Supervisors*, 19 Wall., 247; *County of Moultrie v. Savings Bank*, 92 U. S., 634.

This case is very like, and the facts are even stronger than those set out in the *Moultrie* case, 92 U. S., 635, for here both of the parties to the contract, then present, understood that it was an offer and an acceptance of a subscription.

If the county were here suing the railroad company for a delivery of the stock, predicated its rights upon the assertion that the contract, upon the facts stated, was completed on May 4, 1870, and the company were denying the proposition, the conclusion against the company would be inevitable. The contention of the learned counsel for the county is that, the aid authorized by the Act of 1870 was by a donation of bonds, and that the county had no power to subscribe for stock; and this is based upon the fact that the section of the Act under which the election was held does not, in terms, provide for a subscription for stock. It is

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true that the section empowering the county to hold an election "as to the issuance of county bonds in aid of the construction of said railroad company," says nothing about stock or subscription. The Act in which this section appears is a part of an Act, which provides for aid to different railroad companies by several counties and municipal corporations by the issuance of bonds; and all of them are expressly empowered to subscribe stock except the county of Haywood, the section applying to Haywood County being silent on that subject. On the part of the county it is argued that this difference was intentional upon the part of the Legislature, and that the absence of the express power to subscribe in this section emphasizes, by contrast with its insertion in the other sections, this intention, and clearly establishes that it was the purpose of the Legislature that Haywood County alone should donate its bonds, and have no power, express or implied, to contract for any benefit for them. On the other hand, it is argued that there was no reason for such discrimination; that it is contrary to the history of legislation in this State in such matters; and that the issuance of the bonds being the burden assumed by the county, and the stock to be received in payment therefor being purely a benefit, for which the county assumes no new liability whatever, there is no reason for the strict construction contended for.

In Section 17 of Chapter 57, Acts 1869-70, which is the statute authorizing the consolidation

of the Brownsville & Ohio and the Brownsville & Holly Springs Railroads, it is provided that "the county of Haywood and the city of Brownsville shall have the same authority to *subscribe stock* or *grant aid* to the Brownsville & Holly Springs Railroad Company that *they may have to take stock* in or grant aid to the Brownsville & Ohio Railroad Company." This Act was passed by the same Assembly that passed the former Act, and they were enacted within a few days of each other. It is insisted for petitioner that this Act is a contemporaneous legislative construction of the former Act, and that it recognizes that Haywood County had the right to subscribe for stock in the Brownsville & Ohio Railroad Company.

On the other hand, it is insisted that the language embraces alternatives, "subscribe stock, or grant aid," and contrasts the different powers granted expressly to the city of Brownsville and the county of Haywood respectively, by the former Act.

There is strength in both positions, and we have given them consideration, but the language of the second Act is not sufficiently explicit to disclose any clear legislative intent as to the construction of the former Act. At most it is only suggestive of an understanding of the Legislature, and it is susceptible of two constructions. Therefore it is not a certain and reliable aid in construing the enabling Act.

The county, by the plain terms of the Act,



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was empowered to vote bonds in aid of the railroad. The county now claims that, from the language of this Act, the Legislature intended to debar it of all right to contract for a consideration for its bonds in the nature of a stock subscription or otherwise, and that the only power bestowed, was that of donating the bonds as a pure bounty.

The Act must be construed now, as it would have been if the necessity for its construction had arisen before the new Constitution went into effect.

In seeking for its true intent, the rights and interests of the county, as they were to be affected by its action under it, are to be borne prominently in mind, for that was the subject-matter legislated upon.

The county, now seeking to annul its bonds, asks for a construction which would have been most harsh upon it at the time the bonds were voted. It would be a most narrow construction to hold that, the power granted to vote for bonds in aid of the construction of a railroad, could only be exercised in donating the bonds, and that the language used by the Legislature absolutely excluded their use in any other way. The Act says nothing about donating, and the donation of bonds was a thing quite rare, if not totally unknown in our legislation. No case of a pure donation in this State, under similar or indeed any language, has been called to our attention. Aid, by use of the bonds, might have been extended in at least

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two other ways besides donation, namely, by a loan of the bonds, or by giving them in payment of stock subscription.

The latter has been the usual method which prevailed in this State. Why, then, should it be said that the Legislature meant that, of three ways, the one necessarily must be followed which was least to the interest of the county, and most at variance with the practice in this State? The only argument in favor of such construction is that, at present the county is interested in having that construction put upon the Act, which would have been most detrimental to its interest when it was passed. It would require unequivocal language to indicate that the Legislature intended that county bonds should be donated to the exclusion of all other uses of them in aiding railroad construction. The case of *Concord v. Savings Bank*, 92 U. S., 625, is relied on as an authority for the construction contended for. The question of the construction of the language authorizing a donation was not the point decided, but whether the word "subscriptions" included donations. The Court said that the language of the legislative Act in question authorized a donation; but that was not a contested point in the case. The language, however, was "to appropriate money to aid in the construction." An appropriation of money by Government in aid of public enterprises may well carry with it the idea of a subvention, but the voting of bonds in aid of construction does not necessarily

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imply a bounty, as is contended in this case. In construing such language, the interest of the county voting the aid, and the prior history of legislation on that subject, would control in the construction. The Concord case above cited is not in any sense an authority on this point, for the language is different, and the question of whether or not it implied a donation was not in contest. To say that the language of our Act necessarily meant a donation would be a forced construction. To say that it, while authorizing the issuance of bonds, did not intend that the county might not, by subscription for stock or otherwise, contract for a consideration for them, confers no new power upon the county to assume an obligation or onerate itself with a burden. The power to do an act by which it might suffer loss was conferred in authorizing the bonds, and that is the power that is strictly construed. There is no reason for strict construction when the question of receiving a benefit alone is involved. The power to vote bonds in aid of construction carried with it the power to dispose of them by the county in aid of construction in the usual ways, and stock subscription was unquestionably the one generally pursued by towns and counties.

In view of the character of our legislation on the subject, and of the consideration that the power to subscribe for stock, incident to the issuance of bonds agreed by the railroad to be received in full payment of the stock, is purely in the inter-

est of the county, enabling it to take a benefit in exchange for its bonds, without the assumption of any burden or obligation as a consequence of such agreement to subscribe, we are of the opinion that Haywood County had the right to subscribe for stock, to be paid for in the bonds authorized to be issued by said Act. The voting for the issuance of the bonds, the subscription for stock, and agreement to issue the bonds therefor at a future day, after certain acts to be performed by the company had been done, and the acceptance by the railroad company of the subscription and the agreement to issue such bonds, all constituted a valid, binding contract, which could not be affected by the subsequent change in the Constitution.

But if the Act be treated as only authorizing a donation, then, inasmuch as it directed the bonds to be issued upon a favorable vote, and imposed no other conditions, and the county agreed to deliver them, and the railroad company assented to it, the rights of the company, even on the theory of a donation, became fixed, and the fact that it consented to a future day for delivery, after the performance of certain acts, would not alter its rights. The Legislature had the power to authorize a donation and fix the conditions upon which rights to enforce it should vest. In this respect there is no difference between a donation and a subscription. *Railroad Company v. County of Otoe*, 16 Wall, 675; *New Buffalo v. Iron Company*, 105 U. S., 75.

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In *Livingston County v. Portsmouth Bank*, 128 U. S., 126, it is said that where the statute provides that upon a favorable vote for subscription the County Court should issue the bonds and deliver them to the railroad company, this "imposed a plain duty upon the County Court, because the statute and the vote, taken together, authorized the subscription and the issue of the bonds, and no formal order by the County Court to do those acts was necessary. The statute left no discretion in the County Court, but made it the duty of the Court to make the subscription and issue the bonds. The sole duty of the County Court was to ascertain that the proper vote had been had."

Counsel for defendant contend that, before the donation is completed by delivery, the power to donate may be withdrawn, and that a promise to donate fixes no rights, and cannot be enforced, and that such proposed donation is defeated by the annulment of the Act authorizing it before delivery of the gift. No case is cited sustaining this doctrine. Authority to donate by a county, upon a vote for a public purpose, does not stand upon the same footing as a mere promise of a person to make a present at a future day. An agreement to donate by a county may be irrevocable. In every case cited on this proposition by defendant, whether it was a question of subscription or donation, there was either a condition precedent to the power to contract which had not been fulfilled, before the empowering Act was repealed, or the agents au-

thorized to bind the county had not exercised their power before it was annulled.

In the Concord case, 92 U. S., 630, where the Act was construed as empowering to donate, the Court declares that the towns, before the time arrived when they were authorized to donate, "had no authority to make a contract to give," but it distinctly declares that if an agreement to donate had been made after that time had arrived, it would have been inviolable. The only condition fixed by the Act in this case was the vote upon twenty days' notice. After that the county either had a right to agree to deliver the bonds at a future day, or it had no rights in the premises, the vote itself fixing the rights of the company. In either case such rights, whether fixed by the vote or the contract by the county, was vested before the new Constitution went into effect.

It is contended that, the rule that a power conferred upon a county, to contract for or vote upon a particular proposition, would not authorize it to contract for or vote upon another and different proposition, and that the recital of the officer holding the election, that the vote was upon bonds to be given in subscription for stock, and the action of the County Court in reference to the stock, evidence an infraction, in this case, of the rule. The order of the County Court was that the vote should be "Bonds" or "No Bonds," and the return of the officer shows that this was the proposition actually voted on, and this was in conform-

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ity to the Act of the Legislature authorizing the election. It is not positive, from the officer's recital, that the notice of election actually contained any reference to subscription, but that construction is fairly inferable. If it did, that did not alter the main object of the election, which was to vote bonds in aid of a certain railroad, and this was fully explained in the notice.

The city of Attica case (56 Ind., 477) is cited as being in point, but the Court there held that the entire aim and purpose of the enabling Act, was violated, and that, under the specious guise of aiding in railroad construction, the object really aimed at was, to secure the location of shops, and that there was an entire perversion of the powers granted, and a fraud upon the law. No such state of facts exists here; but the identical road intended by the Legislature and the people to be aided was aided in the very way that the Act and the voters contemplated. The power was given to issue the bonds, and the County Court was charged with the duty of ordering the election and determining whether the requisite vote, upon a proper notice, had been cast, and of issuing the bonds. The bonds were issued by them with a recital that they were issued under the Act of 1870. The county, after they had been delivered to the railroad company by the authority vested with the powers stated, and after it had recognized them by payment of interest for fifteen years, cannot set up an irregularity in the election, against an inno-

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cent purchaser. *Town of Coloma v. Eaves*, 92 U. S., 484; *Humboldt Township v. Long*, 92 U. S., 642; *Dixon County v. Field*, 111 U. S., 94; *Ander-son County, etc., v. Beal*, 113 U. S., 238.

It is further said that it is not shown that the conditions imposed by the county were complied with before the bonds were issued. They were not fixed by the Legislature as conditions precedent, but existed merely by virtue of a contract with the county. An innocent purchaser was not bound to inquire into their performance.

The question presented is similar to one passed upon in *County of Moultrie v. Savings Bank*, 92 U. S., 636, as follows: "Now if it be supposed that the purchaser of bonds with such recitals was bound to look further (the bonds reciting the Act under which they were issued), and inquire what was the authority for the issue, where was he to look? Had he looked to the Act of the General Assembly of March 26, 1869, he would have found plenary authority for a stock subscription and for issuance of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2, 1870, he knew that any subscription made before that time continued binding, notwithstanding the Constitution, and that bonds issued in payment of it were, therefore, lawful. If, then, he had inquired whether a subscription had been made before July 2, 1870, at the only place where inquiry should have been made, namely, at the records of the Board, he would have found an order



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to subscribe equivalent to a subscription made, in December, 1869, corresponding with the assertions of the recitals, and declared by them to have been a subscription. He could have made inquiry nowhere else with any prospect of learning the truth. Every step he could have taken assured him the recitals were true. How, then, can a county be permitted to set up against a *bona fide* holder of the bonds, that the authority to make a subscription, with all its legitimate consequences, had expired before the subscription was made, in the face of the recitals and of the county record? Whether it had expired was a matter of fact, not of law, and it was peculiarly if not exclusively within the knowledge of the Board of Supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after July 2, 1870, when their authority expired."

In *Livingston County v. Portsmouth Bank*, 128 U. S., 127, the Court says that the County Court, having been designated to determine that the conditions existed which authorized the making of the subscription, the fact of the issue of the bonds by the County Court estops the county from asserting against a *bona fide* holder of the bonds any mere irregularity in the making of the subscription or the issuing of the bonds.

It would be far more aggravated to permit a

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county to say that it had itself imposed conditions to be complied with before the bonds were issued, and that they had been issued without such compliance. The county had a right to waive them, and it makes no difference as to the validity of the bonds in the hands of an innocent purchaser whether such conditions were waived, neglected, or complied with.

It is sought to defeat the bonds on the ground that they are void on their face for usury. The Act authorized them to be made, bearing interest at the rate of the place where they were payable. At that time Missouri had a conventional interest law, and a paper bearing eight per cent. interest on its face was legal in that State. There was good reason to permit such bonds to be made payable at money centers, as this would promote their sale and enhance their value. Such a provision was founded on a sound business reason, and we cannot presume that it was a device to pay usury, as that would be an impeachment of the good faith of the law-making power of the State. It is said that the provision was intended to cover the usual and not a conventional rate. The question is whether it is a lawful contract on its face, and this must be settled by the law of the place where it is payable, the Legislature having authorized it to be so made.

The case of *McKinney v. Overton Hotel*, 12 Heis., 104, is relied on by defendant, but it is not in point. The Act declared unconstitutional in that

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case was, in effect, the suspension of the usury law of this State for the benefit of one person. It was a partial law.

In the case under consideration the State simply empowered the county to do what every person in the State had a right to do. It had nothing to do with our usury law.

It is claimed that the bonds are void because voted to one road and issued to another, the consolidation Act not being in force when the notice for the election began to run. There are a number of cases upon this question, and they all go to the point as to whether the Act authorizing the consolidation was in force at the time of voting.

A number of the cases to this effect are reviewed in *Livingston County v. Portsmouth Bank*, 128 U. S., 115. The voting is the act by which the authority to issue bonds is conferred, and if the consolidating Act is then in force it is sufficient. The notice has no function except to inform the voters of the time, place, and purpose of the election.

The judgment is reversed, the demurrer is overruled, and the case is remanded for further proceedings.

Judges Snodgrass and Caldwell did not concur in this conclusion.

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## ERRATA.

Page 13—Citation of *Godfrey v. Templeton*, under first head-note, should be "86 Tenn., 161," instead of "85 Tenn., 161."

Page 109—In citations under second head-note the word "unconstitutional" should follow "Acts 1883, ch. 148," instead of "Acts 1881, ch. 90."

Page 172—In last line of first head-note the phrase "*course of action*" should read "*cause of action*."

Page 232—In seventh and eighth lines from bottom of page "A. & E. *Enc. of Law*," should read "A. & E. *Enc. of Law*."

Page 350—In second line of third head-note "estoppel" should read "estopped."

Page 398—In second line of second head-note "choose" should read "chose."

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